No. 88-2125

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

LOYER EDUCATIONAL TRUST,
LARRY MCDONALD, TRUSTEE,

Petitioner,

v.

WAYNE COUNTY ROAD COMMISSION, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES AND HAROLD H. BONDY, Individually, Jointly and Severally, now COUNTY OF WAYNE, Successor in Interest,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MICHIGAN

RESPONDENTS' BRIEF IN OPPOSITION

– AND APPENDICES –

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COUNTER-QUESTIONS PRESENTED

I.

MAY PETITIONER SEEK REVIEW OF ALLEGED CLAIMS UNDER 42 U.S.C. § 1983 WHEN THERE HAS BEEN NO CITATION TO THAT STATUTE IN THE CASE BEFORE THE PETITION FOR CERTIORARI?

II.

WHERE COUNTY ROAD COMMISSIONS ARE AUTHORIZED TO PROMULGATE RULES REQUIRING COMMERCIAL DEVELOPERS TO ADHERE TO DRIVEWAY CONSTRUCTION AND SAFETY STANDARDS, AND THE RULES ARE WITHIN THE AUTHORITY CONFERRED BY THE LEGISLATURE AND SATISFY THE PURPOSE OF THE EMPOWERING STATUTES, MAY THE RULES BE CHALLENGED AS USURPING LEGISLATIVE AUTHORITY?

III.

WHEN DEVELOPERS ARE REQUIRED TO MEET TRAFFIC SAFETY STANDARDS WHICH ARE TRIGGERED BY THE VOLUME OF CONSUMER TRAFFIC THEY WILL GENERATE, UNDER RULES APPLIED WITHOUT EXCEPTION, CAN PETITIONER BE FOUND TO HAVE SUFFERED DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS?

IV.

WHEN REGULATION IS REASONABLE AND CONSISTENT WITH ASSURING PUBLIC SAFETY, CAN IT BE A TAKING PROHIBITED BY THE CONSTITUTION?

TABLE OF CONTENTS

PAGE

COUNTER-QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

RESPONDENTS' STATEMENT OF THE CASE .. 1

REASONS FOR DENYING THE WRIT:

I. ABSENT A TIMELY AND ADEQUATE CHALLENGE TO THE VALIDITY OF A STATUTE OF A STATE AS REPUGNANT TO THE U.S. CONSTITUTION OR FEDERAL LAWS, JURISDICTION IS NOT SHOWN, AND THERE ARE NO GROUNDS ON WHICH TO GRANT CERTIORARI. 7

II. IF A STATE COURT'S JUDGMENT RESTS ON A STATE GROUND, THE UNITED STATES SUPREME COURT HAS NO JURISDICTION TO REVIEW THE CASE, AND CERTIORARI CANNOT BE GRANTED. 10

MAY PETITIONER SEEK REVIEW OF ALLEGED CLAIMS UNDER 42 U.S.C. § 1983 WHEN THERE HAS BEEN NO CITATION TO THAT STATUTE IN THE CASE BEFORE THE PETITION FOR CERTIORARI? 11

WHERE COUNTY ROAD COMMISSIONS ARE AUTHORIZED TO PROMULGATE RULES REQUIRING COMMERCIAL DEVELOPERS TO ADHERE TO DRIVEWAY CONSTRUCTION AND SAFETY STANDARDS, AND THE RULES ARE WITHIN THE AUTHORITY CONFERRED BY THE LEGISLATURE AND SATISFY THE PURPOSE OF THE EMPOWERING STATUTE, MAY THE RULES BE CHALLENGED AS USURPING LEGISLATIVE AUTHORITY? 12

WHEN DEVELOPERS ARE REQUIRED TO MEET TRAFFIC SAFETY STANDARDS WHICH ARE TRIG-

PAGE

GERED BY THE VOLUME OF CONSUMER TRAFFIC THEY WILL GENERATE, UNDER RULES APPLIED WITHOUT EXCEPTION, CAN PETITIONER BE FOUND TO HAVE SUFFERED DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS? 14

WHEN REGULATION IS REASONABLE AND CONSISTENT WITH ASSURING PUBLIC SAFETY, CAN IT BE A TAKING PROHIBITED BY THE CONSTITUTION? 16

CONCLUSION 18

APPENDICES:

Appendix A — *RULES, STANDARDS AND PROCEDURES FOR DRIVEWAYS WITHIN WAYNE COUNTY ROAD COMMISSION RIGHT-OF-WAY* [*1970, as amended*] A-1

Appendix B — JUDGMENT ORDERING PLAINTIFF TO INSTALL A DRIVEWAY AND PASSING LANE – *Bzovi* v. *Wayne County Road Commission* (Wayne County Circuit Court Case No. 80-028726-CZ; Detroit, Michigan) [*March 6, 1981*] B-1

Appendix C — PETITIONER'S POST HEARING/ TRIAL BRIEF [*May 13, 1986*] C-1

Appendix D — EXCERPTED TRIAL TRANSCRIPT (Pages 4-8: Petitioner's Opening Statement) [*May 13, 1986*] D-1

Appendix E — EXCERPT FROM PETITIONER'S BRIEF ON APPEAL (To State of Michigan Court of Appeals) [*May 11, 1987*] E-1

PAGE

Appendix F — EXCERPT FROM PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL (To State of Michigan Supreme Court) [*June 7, 1988*] F-1

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

Dewey v. *Des Moines*, 173 U.S. 193, 19 S.Ct. 379, 43 L.Ed. 665 (1899) 11

District of Columbia Court of Appeals v. *Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) 10

First English Evangelical Lutheran Church of Glendale v. *County of Los Angeles, California*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) 16

Herb v. *Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945) 10, 11

Keystone Bituminous Coal Assn. v. *De Benedictis*, 480 U.S. ___, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) 17

MacDonald, Sommer & Frates v. *County of Yolo*, 477 U.S. ___, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986) 18

Mugler v. *Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) 17

National Cable Television Assoc. v. *United States and Federal Communications Comm'n.*, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974) 12, 14

PAGE

Nollan v. *California Coastal Commission*, 483 U.S. —, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) 14, 16

Penn Central Transportation Co. v. *City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), reh. den. 439 U.S. 883 (1978) 17

Pennell v. *City of San Jose*, 485 U.S. —, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988) 16

Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) 17

Street v. *New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) 10

Whitney v. *California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) 11

Williams v. *Kaiser*, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398 (1945) 10, 11

Williamson Planning Comm'n. v. *Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) 18

STATE CASES:

Arrowhead Development Co. v. *Livingston County Road Comm'n.*, 413 Mich. 505, 322 N.W.2d 702 (1982) 4, 6, 7, 14

Bzovi v. *Board of Wayne County Road Commission*, Wayne County Circuit Court Case No. 80-028726-CZ (Judge Brennan, March 6, 1981) 6

Cryderman v. *City of Birmingham*, 171 Mich. App. 15, 429 N.W.2d 625 (1988) 16, 17

PAGE

STATUTORY AND CONSTITUTIONAL PROVISIONS:

28 U.S.C. § 1257 ..... 7, 10

42 U.S.C. § 1983 ..... 8, 9, 11

Driveways, Banners, Events and Parades Act, M.C.L.A. 247.321 *et seq.*, M.S.A. 9.140(21) *et seq.* 4, 6, 7, 9, 12, 15, 17

Michigan Vehicle Code, M.C.L.A. 257.606, M.S.A. 9.2306 12

Subdivision Control Act, M.C.L.A. 560.183 *et seq.*, M.S.A. 26.430(183) *et seq.* 4, 6, 7

Mich. Const. 1963, art. 7, § 16 12

U.S. Const. amend. V 9

U.S. Const. amend. XIV 9

OTHER AUTHORITIES:

Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977) 10

Rules, Standards and Procedures for Driveways Within Wayne County Road Commission Right-of-Way (1970, as amended) 6, 8, 9, 10, 12, 13, 14, 15, 16, 17

Weiner, F., *Wanna Make a Federal Case Out of It?*, 48 A.B.A.J. 59 (1962) 10

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Respondents Wayne County Road Commission and the Board of Wayne County Road Commissioners, and individual Commissioners, now County of Wayne, Successor in Interest, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Supreme Court of the State of Michigan.

RESPONDENTS' STATEMENT OF THE CASE

The original Respondents constituted the Wayne County Road Commission. In 1982, Wayne County adopted its home rule charter, and in 1984 the County electorate eliminated the Wayne County Road Commission as a separate entity and incorporated the road authority within the Department of Public Services.

Wayne County is the legal successor to the Wayne County Road Commission as stipulated at trial.

Sometime prior to April, 1981, Petitioner began construction for a commercial shopping strip on Sibley Road in Brownstown Township in southwest Wayne County, half a mile east of Telegraph Road, a state trunkline. Sibley Road is a two-lane county road, one lane eastbound, one westbound, with a posted speed limit of 45 mph. The Loyer property consists of approximately 3½ acres, with a 350-foot frontage on Sibley, on the south side of the road. Surrounding property was essentially undeveloped.

All construction by Petitioner was without a permit, and application was made only after the building and site were substantially completed. Petitioner applied for a driveway permit on April 1, 1981, for approval of a driveway upon the Sibley Road right-of-way. The Wayne County Road Commission did not approve Petitioner's submitted plans, requesting additional data on some points, and notifying Petitioner that it would be required that Petitioner construct a passing lane opposite the driveway to permit motorists to safely go around Petitioner's customers making left turns into the shopping center.

Petitioner relocated the driveway from the Sibley Road frontage to a private road to the west of the construction property. The relocated driveway was also constructed without a permit and without meeting construction or safety standards, and was an attempt to circumvent the necessity for a permit. A second permit application was submitted on October 14, 1981, only after Respondent contacted Loyer to do so.

The Road Commission notified Loyer on November 19, 1981, that, among other things, the private road had

been unlawfully constructed without the requisite permit, and whether or not the shopping center was continued, the road must be reconstructed to meet standards for a street or drive approach to a primary road. Certain information requested by the Road Commission earlier in April had still not been provided. Probably the essential item was the continued requirement of a passing lane on the north side of Sibley, to safely accommodate left-turning traffic into the private road if it was to serve as driveway into the development. The location of the second driveway to the west of the first created additional problems and required additional work of the developer to meet safety standards. Petitioner did not comply with any requirements. Respondents did not issue a permit.

The commercial shopping strip Petitioner had proposed to develop was a 24,000 square foot facility containing a number of shops. Prior use of the land by the same owner was for a garden center using a much smaller building and generating a smaller volume of consumer traffic.

On November 13, 1983, nearly two years after the last plan submitted to Respondents, Loyer Educational Trust filed suit for injunctive relief to require issuance of a permit and asked $750,000 for lost profits, another $750,000 in punitive damages for wrongful conduct, and another $750,000 for violation of unspecified federal and state civil rights.

Testimony on Petitioner's Show Cause for injunctive relief was taken before Wayne County Circuit Judge Paul Teranes on January 4, 1984; briefs were submitted and oral arguments made on February 3, 1984. Petitioner stipulated to Respondents' facts, including that the crux of the dispute was the passing lane on the north side of Sibley. Petitioner further stipulated that

the passing lane was required by the Wayne County Road Commission rules and standards and that the passing lane was a safety feature of the rules. (Hearing Transcript, January 4, 1984, at 5-6.) The Road Commission adopted the rules pursuant to the Driveways, Banners, Events and Parades Act, M.C.L.A. 247.321 *et seq.*, M.S.A. 9.140(21) *et seq.* Petitioner relied exclusively on *Arrowhead Development Co.* v. *Livingston County Road Comm'n.*, 413 Mich. 505, 322 N.W.2d 702 (1982), a case construing the Subdivision Control Act, M.C.L.A. 560.183 *et seq.*, M.S.A. 26.430(183) *et seq.* The pre-trial judge issued an oral decision the same day refusing injunctive relief. He found no irrevocable harm, and because of distinctions he saw between *Arrowhead* and this case, stated he could not find a probability of success on the merits.

At the oral argument before Judge Teranes, Respondents asked Petitioner to mitigate the alleged damages by posting a performance bond as did the *Arrowhead* developer. Petitioner refused. The bond would have allowed Petitioner to open his development and still challenge Respondents' authority. The bond could have been posted as early as 1981 fixing the disputed damages at $40,000.00 for the passing lane and other work on the north side while the parties continued to argue legal matters. The Road Commission also reiterated an earlier offer to defer the passing lane construction for a year after the shopping center opened and it was again refused.

On February 21, 1984, Petitioner filed a Claim of Appeal from Judge Teranes' decision without seeking leave to appeal from an interlocutory order. The Court of Appeals dismissed the appeal on the petition of the Road Commission on May 16, 1984, but without preju-

dice to the filing of a delayed application for leave. Petitioner did not seek leave to appeal.

The case proceeded to a bench trial before Judge Richard Dunn in May, 1986. Petitioner presented testimony of Mr. Loyer, who had served as contractor for Petitioner: on construction costs, on communications between the parties and for the claim that Petitioner had been unfairly treated, compared to his "competitor." Petitioner also presented hypothetical and speculative damages testimony of a real estate broker who cited market value and rental incomes of four neighboring shopping strip developments. Respondents' witnesses were a traffic transportation engineer and a design and mining engineer. They testified to construction costs, the permit application process, the driveway construction rules and regulations, the necessity of a passing lane, the traffic volume generated by commercial developments, including projected left turns at peak hours, and the failure of Petitioner to mitigate damages.

The trial court received as exhibits all correspondence between the parties including blueprints and permit applications and responses, four real estate listings by Petitioner's witness, construction and performance bond cost estimates prepared by each side for the trial, Sibley Road traffic volume counts conducted by Respondents in 1981 and 1983, and a copy of a permit-file for the competitor project. This was the Koza project which testimony showed had selected a site north of Sibley which obviated any drain work, and adjacent to a state highway intersection (I-75) to which the State determined in 1983 to add lanes and signals. The overlap of the State project undertaken with general road funds meant Koza could not be required to pay for a passing lane within the State's work. Koza's

performance bond was canceled. The court further took judicial notice of another driveway permit dispute in the case of *Bzovi* v. *Board of Wayne County Road Commission*, Wayne County Circuit Court Case No. 80-028726-CZ (Judge Brennan, March 6, 1981) in which another Brownstown Township developer was ordered to put in a passing lane. The *Bzovi* development was under 9,000 square feet, and its passing lane performance bond was for $20,000.00.

Before the trial in *Loyer*, the parties had stipulated that the Road Commission had adopted *Rules, Standards and Procedures for Driveways Within Wayne County Road Commission Right-of-Way* in 1970, with proper publication notices and public hearings as required by the Driveway Act. (*See* Respondents' Appendix A for the Rules.) (The *Bzovi* court order is Respondents' Appendix B.)

After four days of trial, the case was taken under advisement. A seven-page opinion was issued on June 19, 1986, with findings of fact and conclusions of law. Judgment for Respondents was entered July 1, 1986.

The trial court found that the rules and standards adopted by the Respondents which required a passing lane were authorized by the Driveway Act and that the Act required Respondents not to issue a permit where a developer refused to comply. The court held *Arrowhead* did not govern this case and that the Driveway Act and the Subdivision Control Act were different creatures. The court further found no wrongful conduct by Respondents and therefore no legal or equitable basis on which to award damages.

Petitioner appealed to the Michigan Court of Appeals, which affirmed the trial court. Petitioner then applied for leave to the Michigan Supreme Court, which denied

leave to appeal and then later denied a petition for reconsideration.

REASONS FOR DENYING THE WRIT

I.

ABSENT A TIMELY AND ADEQUATE CHALLENGE TO THE VALIDITY OF A STATUTE OF A STATE AS REPUGNANT TO THE U.S. CONSTITUTION OR FEDERAL LAWS, JURISDICTION IS NOT SHOWN, AND THERE ARE NO GROUNDS ON WHICH TO GRANT CERTIORARI.

Petitioner stated it invokes jurisdiction pursuant to 28 U.S.C. § 1257 "because a local administrative rule was challenged as violating the U.S. Constitution and the rule was upheld by the Michigan Courts."

Throughout the state court proceedings, however, Petitioner had urged its own particular construction of a Michigan statute to fit within the reasoning and holding of a Michigan Supreme Court case. Petitioner urged the Driveway Act, M.C.L.A. 247.321 *et seq.*, M.S.A. 9.140(21) *et seq.*, be construed in accordance with the Court's reading of the Subdivision Control Act, M.C.L.A. 560.183 *et seq.*, M.S.A. 26.430(183) *et seq.*, in *Arrowhead Development Cop.* v. *Livingston County Road Comm'n.*, 413 Mich. 505, 322 N.W.2d 702.

Petitioner had contended that the Driveway Act did not authorize the Wayne County Road Commission to promulgate rules requiring as a precondition for issuance of a driveway construction permit, under certain circumstances, that commercial developers construct a passing lane around left-turning traffic into the driveways for their commercial development. In effect, Petitioner only challenged that the local government's

rules were repugnant to the state statute and to state decisional law.

It is true Petitioner's original Complaint alleged in Count III, ¶ 2, that Respondents had "in violation of both Michigan and Federal Civil Rights Act, deprived [Petitioner] of certain rights as allowed by law." Vague generic rights are again alluded to in Petitioner's prayer for relief. (Petitioner's Appendix L.)

There was subsequently a bench trial before then-Chief Judge Dunn in May, 1986. Petitioner submitted as its trial brief the same legal brief submitted to the pre-trial judge who heard and denied Petitioner injunctive relief in February, 1983. (Petitioner's trial brief is here submitted as Respondents' Appendix C.) Petitioner's trial brief again challenged the Road Commission's Rules as unauthorized by state law. There was again no mention of 42 U.S.C. § 1983, and, no allegation of specific federal constitutional violations. Indeed, there were not even unspecific federal allegations in this pleading.

Petitioner's opening statement on May 13, 1986 (Respondents' Appendix D) also did not state any federal claims, specific or unspecific.

Petitioner's closing argument on May 20, 1986 (reproduced in its entirety as Petitioner's Appendix M) also did not state any federal claims. Again the argument was entirely state law. Petitioner argued its competitor was more favorably treated, and that Loyer was therefore discriminated against, without mention of state or federal grounds.

The trial court issued an opinion on June 19, 1986. (Petitioner's Appendix H.) The trial court's decision was necessarily on state law grounds finding Respondents' rules establishing traffic safety standards were man-

dated by the Driveway Act and that the Rules were reasonable and properly applied. The trial court found no grounds for legal or equitable relief, concluding "[t]he financial predicament that plaintiffs presently may find themselves in is one largely of their own making." (Petitioner's Appendix at H-7.)

Subsequently, Petitioner filed an appeal as of right to the Michigan Court of Appeals on May 11, 1989. Petitioner's appellate brief Table of Authorities does not cite 42 U.S.C. § 1983, nor any federal case law. (Respondents' Appendix E.) For the first time, Petitioner cited the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner spent less than four pages of a nineteen-page appellate brief on its newly raised and articulated federal claims. The Michigan Court of Appeals affirmed the trial court's finding that the rules and procedures promulgated were well within the authority conferred by the driveway statute and satisfied the purpose of the Act, and that Respondents' requirements of Petitioner were consistent with the rules. The Court of Appeals also found no taking and no denial of equal protection, apparently under either state or federal constitutions. (*See* Petitioner's Appendix at F-7, -8.)

In its subsequent Application for Leave to Appeal to the Michigan Supreme Court dated June 7, 1988, Petitioner expanded its federal authorities to include two federal cases decided in 1987 and slightly lengthened its federal claims arguments. (Respondents' Appendix F; *see also* Petitioner's Appendix E.) Leave was denied December 29, 1988, and Reconsideration was denied March 29, 1989. *See* Petitioner's Appendices D and B, respectively. It is clear Petitioner was content to go to trial arguing state law, and it was only after it lost that it began to attempt to develop a federal claim in order to get a second bite.

Respondents contend the Rules of the Road Commission are not a statute within the meaning of 28 U.S.C. § 1257. Respondents contend further that Petitioner failed to timely and adequately raise and preserve any specific federal claims. *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 484 n. 16, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). *See generally* F. Weiner, *Wanna Make a Federal Case Out of It?*, 48 A.B.A.J. 59 (1962). These are threshold elements which are Petitioner's burden to meet and demonstrate. *Street* v. *New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

II.

IF A STATE COURT'S JUDGMENT RESTS ON A STATE GROUND, THE UNITED STATES SUPREME COURT HAS NO JURISDICTION TO REVIEW THE CASE, AND CERTIORARI CANNOT BE GRANTED.

Even if this Court were to find Petitioner's federal claims were timely and adequately raised, and that Petitioner had otherwise met jurisdictional requirements, jurisdiction is still not established if the state court's decision is based, in the alternative or otherwise, on an adequate and independent nonfederal ground. *See, e.g., Williams* v. *Kaiser*, 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398 (1945). *See also* Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977).

Where the state court decision is on mixed state and federal grounds, and the state court may even be arguably wrong on the federal question, there is no Supreme Court jurisdiction to review the case. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 89 L.Ed. 789 (1945). The Court may inquire if the decision rests on an independent and adequate state ground, but reference in the

opinion to the federal question must be more than broad generalization if the independence or adequacy of the state ground may be overcome. *Herb* v. *Pitcairn, supra*; *Williams* v. *Kaiser, supra* at 477-78.

Jurisdiction is not acquired by speculation as to other grounds the state court might have chosen, or to find "somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature." *Whitney* v. *California*, 274 U.S. 357, 362, 47 S.Ct. 641, 71 L.Ed. 1095 (1927); *Dewey* v. *Des Moines*, 173 U.S. 193, 199, 19 S.Ct. 379, 43 L.Ed. 665 (1899).

MAY PETITIONER SEEK REVIEW OF ALLEGED CLAIMS UNDER 42 U.S.C. § 1983 WHEN THERE HAS BEEN NO CITATION TO THAT STATUTE IN THE CASE BEFORE THE PETITION FOR CERTIORARI?

Petitioner argues a state *must* entertain a claim under 42 U.S.C. § 1983.

Respondents cannot find mention of or citation to 42 U.S.C. § 1983 anywhere in the trial transcripts or in any of Petitioner's state court pleadings at any level. To imply such a claim in retrospect at this stage would encourage unending piecemeal litigation and appeals.

Respondents urge the petition be denied.

WHERE COUNTY ROAD COMMISSIONS ARE AUTHORIZED TO PROMULGATE RULES REQUIRING COMMERCIAL DEVELOPERS TO ADHERE TO DRIVEWAY CONSTRUCTION AND SAFETY STANDARDS, AND THE RULES ARE WITHIN THE AUTHORITY CONFERRED BY THE LEGISLATURE AND SATISFY THE PURPOSE OF THE EMPOWERING STATUTES, MAY THE RULES BE CHALLENGED AS USURPING LEGISLATIVE AUTHORITY?

Petitioner argues the conduct of Respondents conflicts with "pronouncements of this Court's decisions."

(Petition at 16.) In order to make that argument, Petitioner misconstrues and mischaracterizes the nature of Respondents' authority and conduct. Petitioner argues "[a]dministrative agencies merely implement what the legislature creates." [Petition at 17.] Petitioner cites *National Cable Television Assoc.* v. *United States and Federal Communications Comm'n.*, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974) without much elaboration.

First, *National Cable* was not raised by Petitioner in state court proceedings.

Second, Respondents' conduct is fully authorized by state law. The State Constitution states "[t]he legislature may provide the powers and duties of counties in relation to highways." Mich. Const. 1963, art. 7, § 16. There is legislative provision, for example, for specific delegation of police powers to local authorities for control of traffic in the Michigan Vehicle Code. M.C.L.A. 257.606, M.S.A. 9.2306. The constitutional and legislative scheme to delegate local traffic safety to local government is clear.

The Driveway Act was passed in 1969. It was for the purpose of regulating driveways, banners, events and parades upon and over highways, and to provide for promulgation of rules, and to prescribe requirements for the issuance of permits.

The state trial court (Petitioner's Appendix H) and the Michigan Court of Appeals (Petitioner's Appendix F) thoroughly analyzed the Driveway Act and found authorization for Respondents' rules, and approval of the regulatory design. Respondents' rules and standards are reprinted as Respondents' Appendix A.

The Rules (especially Figures 1 through 10) delineate a spectrum of standards depending on the circumstances of a landowner (from single residential to com-

plex intersection corner multiple driveways), the nature of proposed use of property, and the magnitude of traffic problems generated by the specific proposed driveway. There was considerable testimony at trial that traffic counts on Sibley Road, in combination with the left turns projected for peak hours for an operating shopping development of the size and nature proposed by Petitioner, more than warranted the requirement of a passing lane for traffic safety.

Petitioner was required to pay for the passing lane on the north side of Sibley because Petitioner created the traffic hazard. Petitioner expected profits from a commercial venture that depended for its success on consumer traffic. Petitioner early agreed to provide a deceleration lane on the south side for right turns into the development but exaggerated the north side passing lane requirement out of all proportion. Petitioner was not required to widen all of Sibley. The passing lane (Figure 8, Respondents' Appendix A, page A-24) was to be 200 feet long with a 150-foot tapering triangular shape ("tapers") in each direction. No other development could expect to enjoy the passing lane; the nearest neighbor was a single-family dwelling slightly northwest of the relocated driveway. Passing motorists should not have to pay for Petitioner's commercial success with injuries and rear-end collisions, and being forced into a drain culvert. Nor should public monies be diverted from public projects to subsidize a private venture. The north side improvements to the Emit Street apron were necessitated by Petitioner's relocation of the drive. The drain enclosure requirement was necessitated by Petitioner's site selection. These facts are amply supported by the record.

Third, Respondents' rules are fully consistent with federal law. Respondents' rules served the governmental

purposes of the statute and are therefore a valid regulation. Petitioner's development created the problem and would derive sole benefit from the resolution of the problem. The condition on the permit of a passing lane for large volume, traffic-generating, developments serves the same purpose as prohibiting the development altogether and is therefore a valid regulation of land use. *Nollan* v. *California Coastal Commission*, 483 U.S. __, 107 S.Ct. at 3148, 97 L.Ed.2d 677 (1987). The state court in *Loyer* acted in harmony with *Nollan*.

National Cable involved licensing fees for community antenna television systems. The court held a fee is permissible when there is a benefit bestowed on the applicant that is not shared by other members of society. 415 U.S. at 341-42, 94 S.Ct. at 1149, 39 L.Ed.2d 370. Petitioner cannot show that Respondents or the state court acted contrary to *National Cable* or other federal decisions.

WHEN DEVELOPERS ARE REQUIRED TO MEET TRAFFIC SAFETY STANDARDS WHICH ARE TRIGGERED BY THE VOLUME OF CONSUMER TRAFFIC THEY WILL GENERATE, UNDER RULES APPLIED WITHOUT EXCEPTION, CAN PETITIONER BE FOUND TO HAVE SUFFERED DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS?

Petitioner argued in state court that the right-of-way on the north side of Sibley was off-site to Petitioner's land, so the case might better fall within *Arrowhead*. Petitioner now argues it is off-site so as to make the required safety work unreasonable. In reality, the road right-of-way extends from private property line to private property line, and includes roadways, shoulders and drainage ditches. The road right-of-way adjoins and touches Petitioner's property. A driveway, by its nature,

becomes a part of the road for the motoring public and depends on the road right-of-way to fully and safely complete its purpose of providing entry and exit. (*See* Respondents' Appendix A, Figure 8, page A-24.) The Driveway Act describes itself as *"regulating driveways,* banners, events and parades *upon* and over *highways"* (emphasis added).

Petitioner has complained of unfair treatment, but in actuality, Petitioner has asked for preferential treatment. Respondents' engineers testified no exception was ever made under the Rules since their adoption. Petitioner asked to be exempted from the safety measures required of others. It sought to circumvent the permit application process. It chose a poor site and committed to the site by expending monies before ascertaining permit requirements. It demands public funds be used to provide safe passage to motorists around the consumer traffic its commercial development will generate.

Petitioner was given numerous meetings and hearings. Political intervention was made on its behalf by a local official. Petitioner consistently from 1981 refused to post $40,000.00 construction bond or issue a letter of credit (common construction contractor procedures even when there is no dispute), then complained its "competitor" Koza was allowed to open before it, in 1983. The Koza developer followed the procedure. The Arrowhead developer also did. Petitioner would not.

Equal protection of the laws is not violated when all persons similarly situated are treated similarly.

Respondents' rules, standards and procedures were adopted and published over a decade before Petitioner began to complain there were no standards. Respondents' rules may displease Petitioner but are not un-

reasonable. Respondents' rules are rationally related to a legitimate state interest. *E.g., Pennell* v. *City of San Jose*, 485 U.S. __, 108 S.Ct. 849, 859, 99 L.Ed.2d 1 (1988). Protection of public welfare is a legitimate and rational goal of traffic safety regulation. *Id.*, 485 U.S. __, 108 S.Ct. at 858-59, 99 L.Ed.2d 1. *See also Cryderman* v. *City of Birmingham*, 171 Mich. App. 15, 429 N.W.2d 625 (1988). In addition, the hardship to the owner should not be self-created. *Id.* at 21, 429 N.W.2d 625.

WHEN REGULATION IS REASONABLE AND CONSISTENT WITH ASSURING PUBLIC SAFETY, CAN IT BE A TAKING PROHIBITED BY THE CONSTITUTION?

Petitioner argues there was a taking of its property. Petitioner doesn't reason, but rather concludes there was a taking, *citing First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles, California*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) and *Nollan* v. *California Coastal Commission, supra.* Petitioner insists there was a regulatory taking which deprived Loyer of *all* use of the property.

Petitioner claims this issue was "raised and briefed throughout these proceedings." Respondents can find no mention and no briefing of Petitioner's Question IV in state court until appeal to the Michigan Court of Appeals. (*See* Respondents' Appendices C-E.)

Nollan was discussed earlier in this brief.

First Evangelical is a complex case. It involved an ordinance which was found to have deprived the landowner of all beneficial use. There was testimony in *Loyer* that Petitioner continued to use the southern part of the property for the L. Loyer Construction Company headquarters, and was using the shopping strip shell for storage for his construction business. It had also formerly been used for a nursery business.

The Driveway Act and Respondents' standards required safety preconditions be met for issuance of a permit. The Rules allowed issuance of a permit on a performance bond. Petitioner refused the deferred construction plan offered by Respondents.

Nothing prevented Petitioner from using the property for a different venture which would not generate as much traffic. Certainly nothing did prevent Petitioner from using the property to store construction materials and equipment. Therefore, Petitioner was not denied all use.

Under both state and federal law, land use regulation which precludes the most beneficial use may be justified where restriction is reasonably necessary to the effectuation of a substantial public purpose. *Cryderman* v. *Birmingham, supra,* 171 Mich. App. at 27, 429 N.W.2d 625, *citing Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104, 129, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), reh. den. 439 U.S. 883 (1978).

Assuming Petitioner's land use was regulated at all, it is well settled that property use may be regulated. *E.g., Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). Certainly if the regulation goes "too far," it will be recognized as a taking. *Id.* at 415, 43 S.Ct. at 160, 67 L.Ed. 322. But a landowner has an obligation in the use of his land not to injure the community. *Keystone Bituminous Coal Assn.* v. *DeBenedictis,* 480 U.S. ___, 107 S.Ct. 1232, 1245, 94 L.Ed.2d 472 (1987). *See also Mugler* v. *Kansas,* 123 U.S. 623, 665, 8 S.Ct. 273, 299, 31 L.Ed. 205 (1887). In fact, the Supreme Court in *Keystone* determined that health and safety regulation cannot constitute a taking. 480 U.S. at ___, n. 22, 107 S.Ct. at 124, n. 22, 94 L.Ed.2d 472.

Finally, the Supreme Court has declined to review a taking claim as long as the property owner had an

opportunity to obtain relief from the regulating authority that would permit the development of the property to go forward. *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. ___, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Williamson Planning Comm'n.* v. *Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

By: SAUL A. GREEN
Wayne County Corporation Counsel

/s/ LAMBRO NIFOROS (P31909)
Assistant Corporation Counsel
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Detroit, Michigan 48226
(313) 224-5030

Counsel for Respondents

DATED: July 27, 1989.

APPENDICES TO BRIEF IN OPPOSITION

• • •

RESPONDENTS' APPENDIX A

RULES, STANDARDS AND PROCEDURES FOR DRIVEWAYS WITHIN WAYNE COUNTY ROAD COMMISSION RIGHT-OF-WAY

BOARD OF WAYNE COUNTY ROAD COMMISSIONERS
415 CLIFFORD DETROIT, MICH 48226

ADOPTED February 17, 1970
Revised as of April 1, 1981

The efficiency and safety of a road or street depends to a large extent upon the amount and character of roadside interference with the movement of through traffic. Vehicles entering, leaving or crossing the roadway from residences, businesses, shopping centers, restaurants and other developments cause some of this interference. To the extent that this friction can be reduced, the highway user will benefit.

Accordingly, regulation and control of driveways are necessary to provide efficient and safe operation and to utilize the full potential of the highway investment. Highway-fronting land owners have certain rights of access consistent with their needs, and road users have certain rights to freedom of movement and safety. The Wayne County Road Commission has the responsibility of regulating and controlling the location, design and operation of access to roads and streets under its jurisdiction.

PURPOSE

These Rules, Standards and Procedures set forth the policy guidelines of the Wayne County Road Commis-

sion concerning driveways and sets forth the basic requirements for the design and construction of these driveways.

The objectives of these Rules, Standards and Procedures are:

1. To provide maximum protection and safety for the public through the orderly control of traffic entering and leaving roads or streets at driveways.
2. To provide a uniform policy throughout the County in the design and construction of driveways.

DRIVEWAY PERMITS

GENERAL

Any person, organization or governmental unit desiring to construct, reconstruct, relocate or resurface a driveway within Wayne County Road Commission right-of-way shall make application and secure a permit before beginning construction. Platted street approaches and crossovers in highway medians shall be governed by the Board's published Subdivision Rules and Regulations. The acceptable applicants for driveway permits are property owners or lessees, or a contractor employed by the property owner. However, the owner or his agent and the contractor may be required to sign the permit.

A revision in the manner of use of property abutting a highway (viz; a change from residential to commercial use or in the type of commercial operation) may require alterations in the number, design and/or loca-

tion of driveways. The owner or such property shall obtain a permit for and accomplish such driveway revisions as are determined to be necessary by the Wayne County Road Commission.

The applicant shall furnish all materials and bear all costs of necessary construction, including tapers, widenings, islands, pavement marking, signing, etc., within Wayne County Road Commission right-of-way. Further, it shall be the responsibility of the property owner or lessee to maintain all driveways connecting the property to the roadway, as well as those appurtenances set forth in the permit as related requirements. Maintenance of road widenings which become part of the main roadway will not be the responsibility of the permit holder.

The Wayne County Road Commission reserves the right of inspection by its authorized representatives of any driveway construction within the highway right-of-way. The permit applicant shall reimburse the Wayne County Road Commission for the services required for the review and approval of plans, and for any on-the-job inspectors which are required. In the event of failure to comply with the terms and conditions of the permit or if the property owner fails to obtain a permit, the Wayne County Road Commission shall have the right to take appropriate action as allowed in Act 200 of the Public Acts of 1969. All costs incurred in corrective action to comply with design standards, defective workmanship and/or materials shall be borne by the applicant.

Applications should be submitted as early as possible. In the case of new commercial, industrial and apartment developments, the Wayne County Road Commission Engineer of Highway Design should be contacted in the initial site planning stages so that a

preliminary access plan satisfactory to all parties can be established early in the development process. This access plan will include satisfactory storm drainage outlets, proper driveway locations and will consider the relationship between parking and storage facilities and other development in the vicinity, either on private property or on public right-of-way. COUNTY ROAD DRAINAGE FACILITIES MAY NOT BE USED TO DRAIN STORM WATER FROM PRIVATE PROPERTY.

MAKING APPLICATION

Prior to applying for a permit for industrial, commercial or apartment driveways, the site development plans for the complete project must have the approval of the Engineer of Highway Design.

All applications for industrial, commercial or apartment driveways shall be submitted to the Engineer of Streets, 415 Clifford, Detroit, Michigan 48226, phone 224-7600 (or as directed by the letter of plan approval). The permit is fully executed and in force after the plans are approved and the permit signed by the owner or his agent, the contractor and the authorized representative of the Board.

Applications for residential driveways should be submitted to the Board's Airport Building 358, Middlebelt Road, Romulus, Michigan, Phone 941-8500.

BONDS

Bonds are required on all industrial, commercial and apartment driveways to protect the Wayne County Road Commission against the cost of completing construction or repairing deficiencies. Acceptable types of bonds

are cash, certified or cashier's checks, and money orders made payable to the Wayne County Road Commission.

CERTIFICATES OF INSURANCE

Certificates of insurance are required on all industrial, commercial and apartment driveways to ensure that claims for damage or personal injury can be met. General liability insurance carried by an applicant or contractor is acceptable.

FEES

Commercial, Industrial & Apartment Driveways

A non-returnable fixed permit fee to cover the cost of processing the permit will be collected at the time the permit is issued based on the Board's current fee schedule.

A plan review fee to recover the cost of plan review will also be collected at the time the permit is issued. The plan review fee will be proportionately higher if deceleration and/or passing lanes are part of the driveway construction.

If the applicant requests driveway replacement or reconstruction utilizing an existing curb drop, he will still be required to pay the fixed permit fee for processing the permit, but will not be liable to a plan review fee.

Residential Drives

A permit is required and a non-returnable fixed permit fee for permit processing will be collected at the time the permit is issued based on the Board's current Fee Schedule. A plan review fee will not be charged.

Street Protection Permits are required when a drive approach is constructed in connection with home building operations. The permit fee will be in accordance with the Board's current Fee Schedule. A Performance Bond will also be required in connection with Street Protection Permits and Driveway Permits where a curb cut or ditch enclosure is involved.

If the applicant requests driveway replacement or reconstruction utilizing an existing curb drop, he will still be required to pay the fixed permit fee for processing the permit, but will not be liable to a plan review fee.

Miscellaneous Construction

A permit is required with fees in accordance with the Board's current Fee Schedule. A performance Bond may also be required.

A permit and fee in accordance with the Board's current Fee Schedule is required to place any type of hard surface between the edge of pavement and the right-of-way line. The actual cost of inspection will be charged against the project and a separate deposit or performance bond will be required to guarantee such costs. Where the pavement is not curbed, provisions for a curb or safety island as directed by the Board's Engineer must be provided by the owner. Approval to place hard surfacing is not to be construed as permission to park vehicles within the road right-of-way where such parking may presently or in the future be prohibited by statute or by the posting of official signs.

A permit and fee in accordance with the Board's current Fee Schedule is required to excavate in the Board's right-of-way. The actual cost of inspection will also be recovered by the Board. A separate deposit will be required to guarantee proper performance and inspection costs.

DEPOSITS

Commercial, Industrial & Apartment driveways

Should the proposed project involve road widenings and/or the construction of enclosed storm drainage in the road right-of-way, full time inspection will be required. In this case, a deposit will be taken to cover all direct inspection costs. The amount of the deposit will be determined at the time of application based on the size and scope of the project.

The Board will keep track of the actual inspection costs incurred by it in connection with each project. In the event the Board's costs are less than the deposit, the excess will be returned to the owner. In the event the Board's costs are greater than the deposit, the owner will be billed for the deficiency. The Board's objective is to recover actual costs incurrec by it.

PLANS REQUIRED

All copies of driveway permit applications must be accompanied by a plan clearly indicating the following:

1. Street name and address, highway pavement, right-of-way and property lines, lot or parcel number, highway appurtenances, medians (if existing) and dimensions of same.
2. All buildings (proposed or existing) and all appurtenances to any business conducted (gas pumps, signs, canopies, etc.) and dimensions of same.
3. Driveways to be constructed, proposed surfacing, proposed drainage scheme and dimensions including:

a. width of driveway

b. radii of driveway returns, islands and other points of curvature

c. driveway elevations

d. the approximate angle the driveway makes with the highway centerline

e. proposed culvert or sewer grades with sufficient elevations upstream and downstream to show the extent of flow across the proposed development and to the proposed outlet

4. Drainage plan and outlet for all storm drainage on the site. DRAINAGE FROM ADJACENT PARKING OR STORAGE AREAS ON PRIVATE PROPERTY MAY *NOT* BE DISCHARGED ONTO THE HIGHWAY OR ITS APPURTENANCES.

5. Location of the driveways including dimensions relating to:

   a. property lines and property lines extended to the pavement

   b. buildings and business appurtenances

   c. reference dimension to nearest cross road or street

6. North directional arrow.

The above requirements, when applicable, should be incorporated with appropriate guidelines from the Typical Drawings 1 through 10 to form a complete plan for permit application.

Proposed driveways shall be designed and constructed in accordance with the Rules and Regulations of the Wayne County Road Commission, the general guide-

lines contained herein and in accordance with the specific recommendations of the Board's Engineer. Applications and plans for platted street approaches must meet the minimum requirements shown in the published Wayne County Road Commission Subdivision Rules and Regulations.

WHERE TO APPLY

After plan approval has been obtained the permits may be secured as listed below:

Residential Drives & Miscellaneous:
Airport Building 358, Middlebelt Road, Romulus, Michigan; Phone 941-8500

Commercial, Industrial & Apartment Drives:
Engineer of Streets, 415 Clifford, Detroit, Michigan 48226; Phone 224-7600

DESIGN REQUIREMENTS

FUTURE RIGHT-OF-WAY LINE

For information regarding right-of-way requirements, the property owner is referred to the updated Master Plan for Right-of-Way adopted by the Board of Wayne County Road Commissioners on December 24, 1969. From it he shall determine the future right-of-way requirements of the road or street abutting his property before buildings, gas pumps and similar fixed objects are located on the property. In the event that future right-of-way width requirements are greater than existing right-of-way widths, all fixed objects should be located far enough from such future right-of-way that safe efficient traffic operation may be maintained on

the road or street, and functional operation of the abutting property may continue unabated when such future right-of-way is acquired for highway purposes.

BUFFER AREA

The space between the right-of-way line and the pavement edge shall be utilized to provide a physical barrier (buffer area) between highway vehicles and pedestrians or other vehicles on private property, to ensure that adequate sight distance will be available for safe traffic operation, to provide clear delineation of driveway openings, to facilitate proper drainage and to accommodate suitable slopes for maintenance operations. The buffer area may be established by curb, guardrail, guardposts, low shrubs or an equivalent method adequate to prevent encroachment. Trees, shrubs, ground cover or other landscape features within the buffer area shall be removed or suitably adjusted to provide the required sight distance.

DRIVEWAY LOCATION

Driveways shall be located so that no undue interference with the free movement of normal highway traffic will result. Driveways should be located as far from the edge of the intersecting roadway as is possible. The radius of a driveway should not encroach upon the intersection radius of the roadway pavements.

Commercial, industrial and apartment driveways, including their radii, shall be located entirely within the permit applicant's roadway frontage, which shall be determined by the extension of the property lines to the pavement edge.

NUMBER OF DRIVEWAYS

The number of driveways which will be permitted to provide access to the roadway will be the minimum number required to adequately serve the needs of the land use.

The Wayne County Road Commission encourages adjacent commercial property owners to consolidate their driveways by using either a frontage road or a joint driveway system.

The Wayne County Road Commission reserves the right to deny driveway access when such construction would result in unreasonable safety hazards.

SIGNING

The permit applicant at his expense shall provide, erect and maintain all necessary signing (Stop, Keep Right, Do Not Enter, etc.) and/or pavement markings which the Board's Engineer determines are required. The plans shall indicate the signing and pavement marking required, as specified above. All signing and/or pavement marking shall conform with the Michigan Manual of Uniform Traffic Control Devices.

PARKING AND STORAGE

It is the intent of the Board that commercial establishments of a "drive-in" nature (drive-in theaters, drive-in banks, auto washes, etc.) should provide adequate storage off highway rights-of-way for vehicles waiting to be serviced since vehicle storage on highway lanes or shoulders cannot be tolerated.

DRIVEWAY SURFACING

All driveways, except residential drives to uncurbed pavements, shall be surfaced from the edge of the traveled way to the right-of-way line with a material which is equal to or better than the surface of the traveled way which it joins. The Board's Engineer shall determine whether or not any specific material is equal to or better than the surface of the traveled way.

The minimum surface requirements for each development are as follows:

A. RESIDENTIAL DRIVEWAYS

1. The minimum surface requirement for residential driveways to gravel roads shall be 6" of compacted aggregate.
2. Residential driveways which meet a curbed pavement shall be a minimum of one of the following:
   a. 6" unreinforced concrete
   b. 6" deep strength asphalt
   c. 6" compacted aggregate with a 2" Asphaltic Concrete surface
3. Residential driveways to uncurbed hard surface roads or streets may be surfaced as described in Section A-2 but will terminate in line with the backslope of the road ditch, and balance of driveway shall be surfaced as described in Section A-1 above.

B. COMMERCIAL, INDUSTRIAL & APARTMENT DRIVEWAYS

1. The minimum surface requirement for this type driveway to a gravel road will be 10" of

compacted 3A aggregate surfaced with 2" of compacted 22A aggregate.

2. The minimum surface requirement for this type driveway to hard surface roads at developments which are considered heavy traffic generators, or which are expected to carry heavy loads, shall be either of the following:

   a. 8" unreinforced concrete pavement

   b. 9" Asphaltic Concrete base with 1½" of 31A Asphaltic Concrete Wearing Course

3. The minimum surface requirement for this type driveway to hard surface roads at developments which are considered medium or light traffic generators shall be either of the following:

   a. 7" unreinforced concrete pavement

   b. 7" Asphaltic Concrete base with 1½" of 31A Asphaltic Concrete Wearing Course

   c. 10" compacted 3A aggregate with 2" of 31A Asphaltic Concrete Wearing Course

The pavement section required for road widenings, crossovers or taper sections shall be as directed by the Board's Engineer. Shoulder areas shall conform with current Wayne County Road Commission Standards and Specifications.

The shoulder area between adjacent commercial driveways serving the same property which are less than 200' apart (centerline to centerline) must be paved as directed by the Board's Engineer.

DRAINAGE

It shall be the responsibility of the permit applicant to ensure that highway drainage is not adversely affected by proposed driveways.

Drainage from adjacent parking or storage areas on private property may *not* be discharged onto the highway or its appurtenances. All culverts, catch basins, drainage ditches and other drainage structures required within the highway right-of-way, including culverts under driveways, shall be installed in accordance with Wayne County Road Commission Standards and Specifications.

Headwalls above grade shall not be used at driveway culverts. Sod, grouted rip-rap or other suitable material shall be placed at all culvert ends to prevent erosion. Headwalls may be required where grades permit.

MAINTENANCE

The permit holder will be responsible for the maintenance of all work constructed or placed in the road or street right-of-way, except for widening lanes which are incorporated into the main traveled roadway.

INSPECTION

All driveway construction shall be performed under inspection by the Wayne County Road Commission. The executed permit will provide the Department telephone number to call for this service.

DRIVEWAY DIMENSIONS

Driveways must be designed to facilitate safe and expeditious vehicle movements to and from the high-

way. Figures 1 through 10 provide guidelines which shall be followed in the design and dimensioning of driveways in preparing plans for permit application.

The permit applicant shall indicate on the plan the driveway layout requested, including the number, type, dimensions, location and spacing of driveways. The Board's Engineer may approve the requested layout or may require changes so that the proposed layout will accommodate the vehicles normally expected without creating undue congestion or hazard on the highway.

The permit applicant shall provide a deceleration lane and/or tapers as part of a commercial, industrial, apartment driveway or other heavy traffic generators if the Board's Engineer determines that such deceleration lane and/or tapers are required to minimize congestion or hazard on the highway which may be caused by vehicles using the applicant's driveway. Typical dimensions are shown in Figures 5 and 6.

The permit applicant shall provide a passing lane on the side of the highway directly opposite a proposed commercial, industrial, apartment driveway or other heavy traffic generators when warranted in accordance with the highway vehicle volume and anticipated peak hour vehicle left turns from the highway as shown in Figure 7. When other conditions such as horizontal and vertical sight distance, traffic signal location and other physical factors directly affect public safety, a passing lane shall be required. Minimum dimensions for a passing lane are shown in Figure 8.

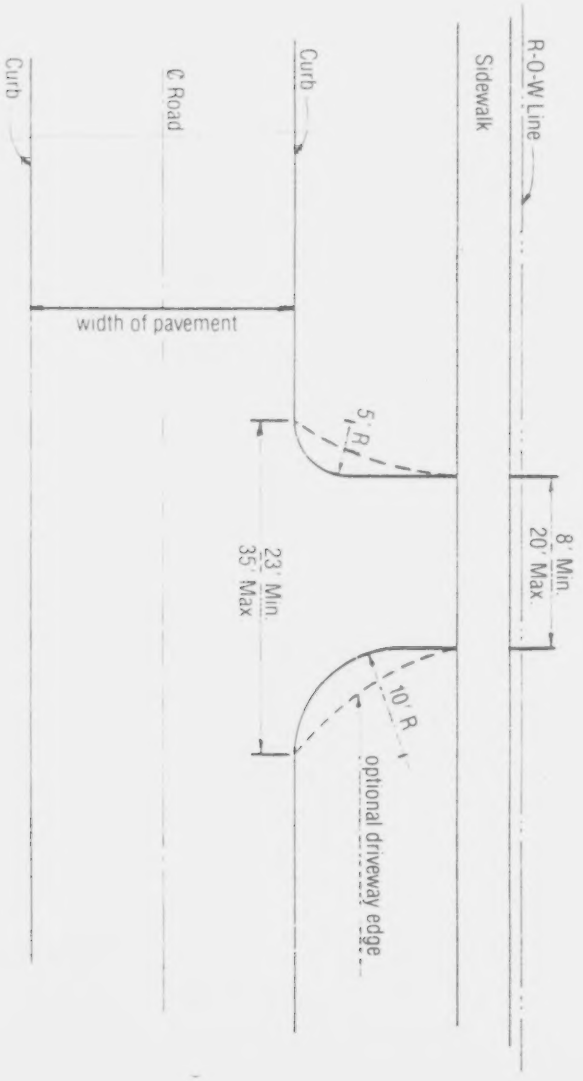
Minimum and maximum dimensions for gasoline service stations are shown in Figures 9 and 10. Angular (60 degree minimum) and perpendicular driveways may be used in pairs or combinations of each type.

Driveway openings at the curb or pavement edge shall be a minimum distance of 10 feet from the side road right-of-way line extended, and shall be a minimum distance of 5 feet from the line between abutting properties extended. These minimum dimensions are shown in Figures 9 and 10 and they apply to all commercial, industrial, apartment driveways and other heavy traffic generators.

FIGURE 1

RESIDENTIAL DRIVEWAY

CURBED HIGHWAY (Primary)

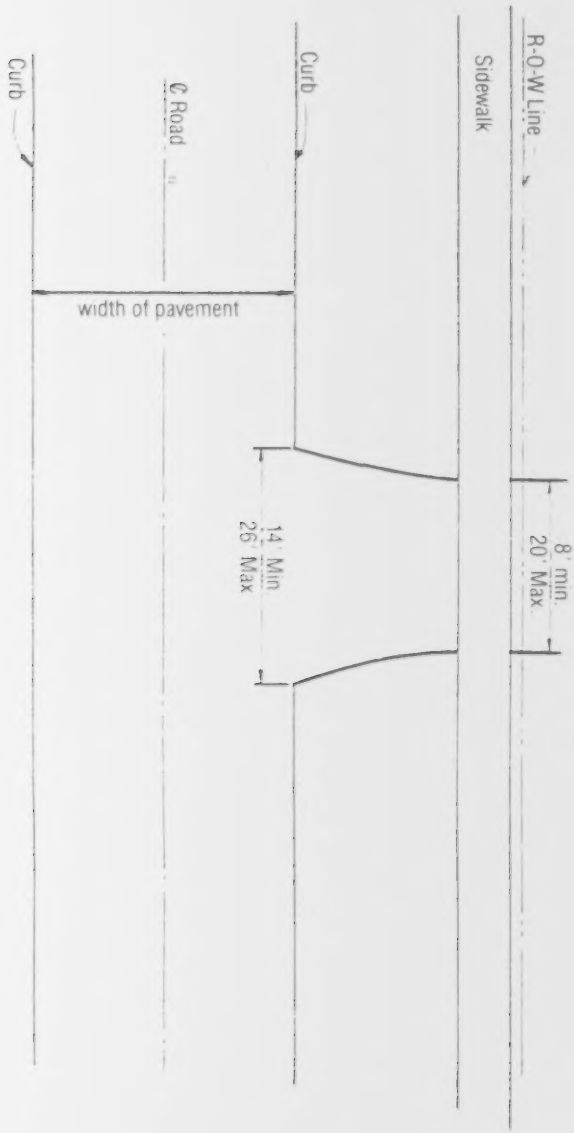


NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

FIGURE 2

RESIDENTIAL DRIVEWAY

CURBED STREET (Local)

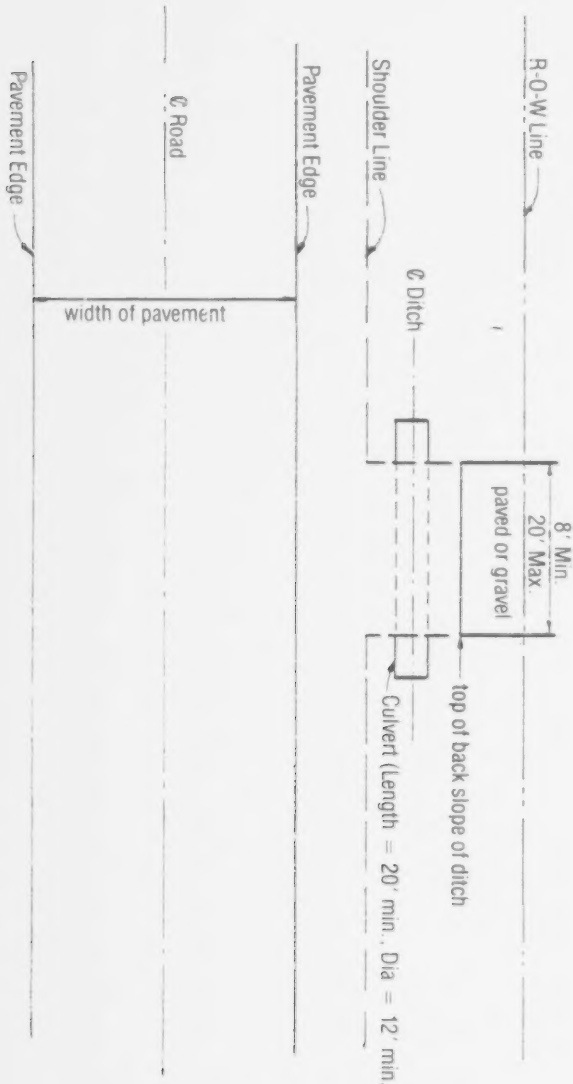


NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

FIGURE 3

RESIDENTIAL DRIVEWAY

UNCURBED HIGHWAY OR STREET

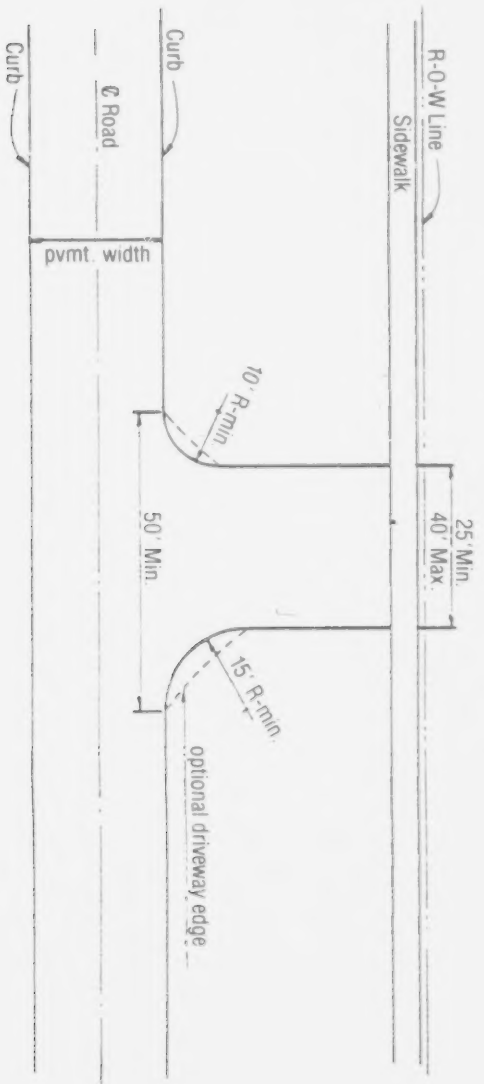


NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

FIGURE 4

COMMERCIAL DRIVEWAY (Two-Way)

CURBED HIGHWAY

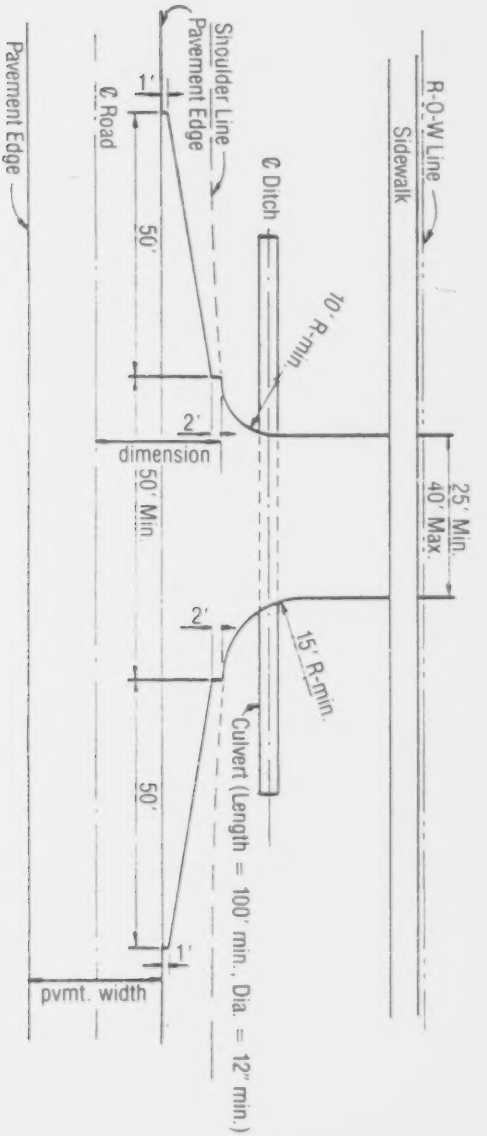


NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

FIGURE 5

COMMERCIAL DRIVEWAY (Two-Way)

UNCURBED HIGHWAY

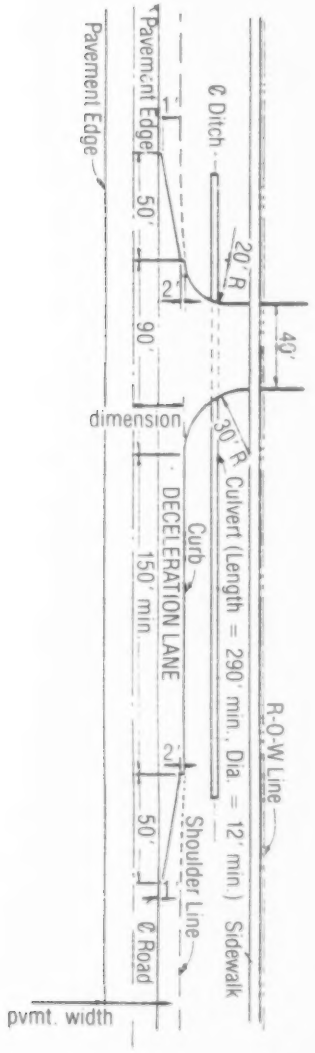


NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

FIGURE 6

MAJOR COMMERCIAL, INDUSTRIAL & APARTMENT DRIVEWAY (Two-Way)

UNCURBED HIGHWAY



NOTE: FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."

FIGURE 7

WARRANT FOR LEFT TURN PASSING LANE

(Based on Ultimate Development)

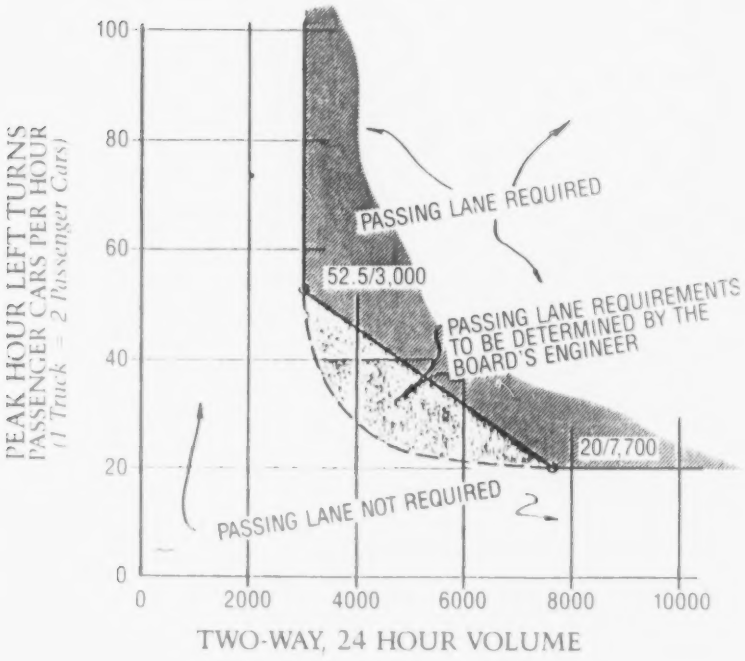
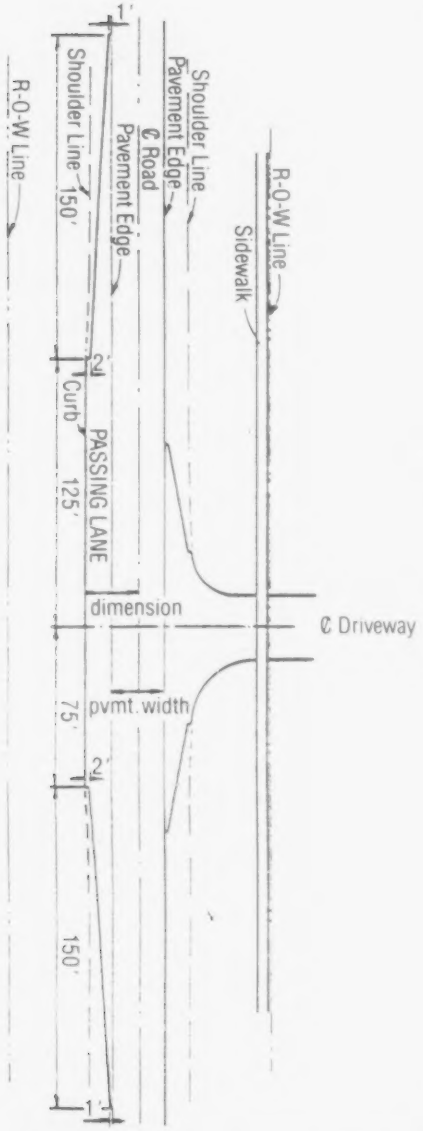


FIGURE 8

PASSING LANE

(MINIMUM)

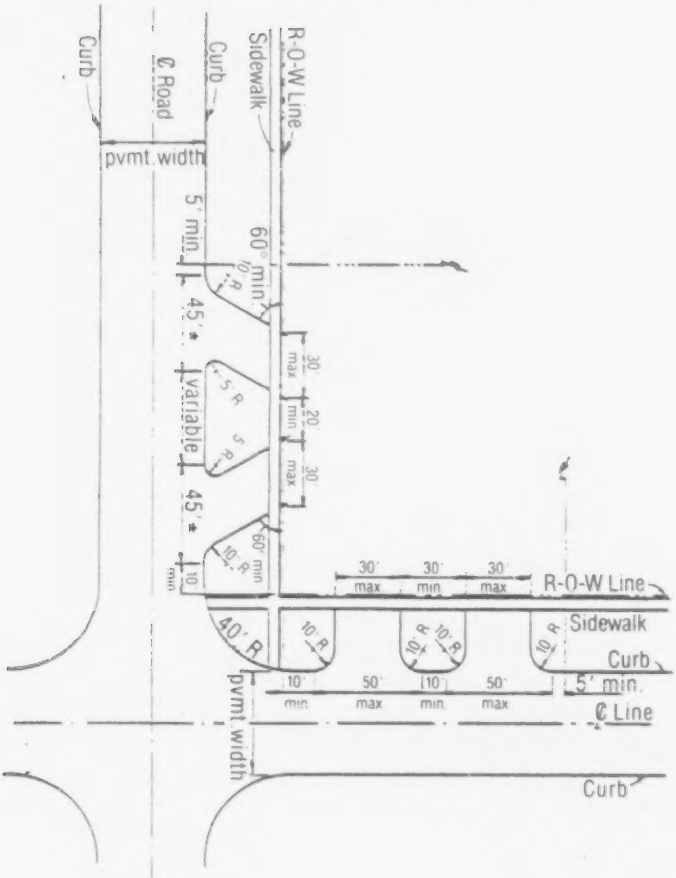


NOTE: FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."

FIGURE 9

GASOLINE SERVICE STATION DRIVEWAYS

CURBED HIGHWAY

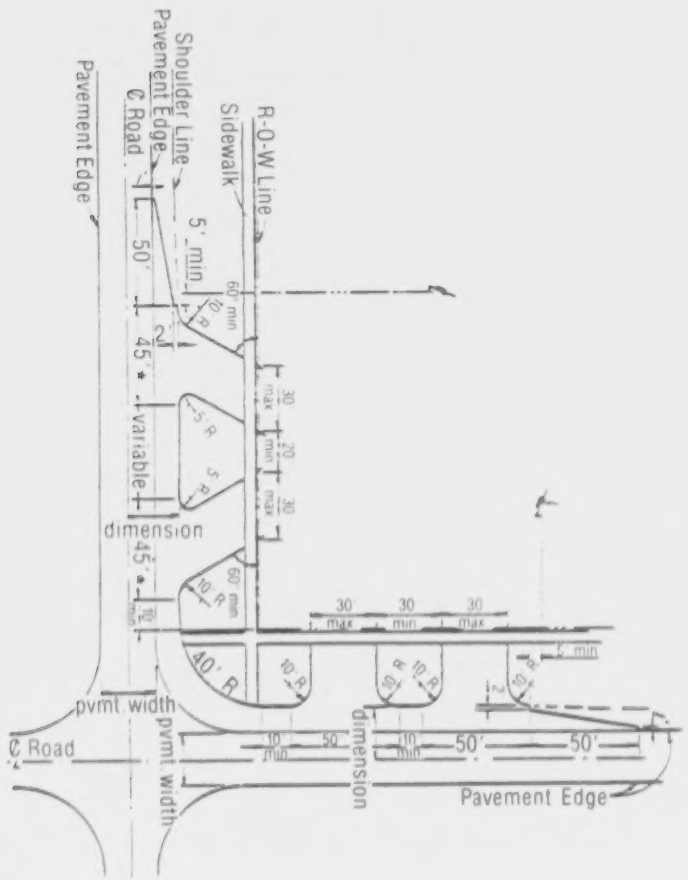


NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

FIGURE 10

GASOLINE SERVICE STATION DRIVEWAYS

UNCURBED HIGHWAY



NOTE: **FOR SPECIFIC DETAILS ON DRIVEWAY REQUIREMENTS, SEE PAGE 5, "PLANS REQUIRED."**

RESPONDENTS' APPENDIX B

JUDGMENT ORDERING PLAINTIFF TO INSTALL A DRIVEWAY AND PASSING LANE

(State of Michigan — Circuit Court — County of Wayne)

(Session of February 6, 1981; Order Entered March 6, 1981)

(DANIEL BZOVI, Plaintiff, vs BOARD OF COUNTY ROAD COMMISSIONERS OF THE COUNTY OF WAYNE, MICHIGAN, a public body corporate, Defendant — Civil Action No. 80 028726 CZ)

At a session of the Court held on the 6th day of February, 1981 in the City-County Building, Detroit, Michigan.

PRESENT: Honorable Thomas J. Brennan (P 11173), Circuit Judge.

This matter having come on to be heard upon Plaintiffs Complaint and Petition for an Order to Show Cause, and argument having been made, proofs being taken in open Court, memoranda of authority being filed by the respective parties to this action, and the Court having made findings of fact and law in open Court, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED and adjudged that this Court finds, as a matter of law, that ~~the~~ Defendant BOARD acted in accordance with Act No. 200 of the Public Acts of 1969, MCLA 247.321, et. seq., MSA 9.140(21), et. seq., in requiring the Plaintiff to provide a driveway to his property and a passing lane and that the rules and regulations adopted by the Defendant BOARD pursuant to the aforesaid Statute, more particularly described as the

"Rules, Standards, and Procedures for Driveways within Wayne County Road Commission Right-of-Way", adopted in February, 1970, and revised on January 1, 1979, are legally sufficient and are reasonable and proper, and the said Plaintiff is hereby ordered to comply with the aforesaid Rules for the installation of his driveway and necessary passing lane at the West Road property as shown in these proceedings; and

IT IS FURTHER ORDERED and adjudged that the Defendant BOARD OF WAYNE COUNTY ROAD COMMISSIONERS proceeded in this action in accordance with its Statutory duty to provide for the health, safety, and welfare of the traveling public, and that the said illegal temporary driveway installed without a permit from the Plaintiff is improper in that it is unsafe and does not comply with the aforesaid "Rules"; and

IT IS FURTHER ORDERED that the Court, having made findings of the fact and rulings of law, directs the Plaintiff, DANIEL BZOVI, to proceed towards causing the construction and installatio of the driveway into his property, known as 22700 West Road, Trenton, Michigan 48183, being more particularly described as the part of the SW 1/4 of Section 16, Brownstown Township, T4S, R10E, Wayne County, Michigan, together with the necessary passing lane on the south side of West Road, in accordance with the plans and specifications filed by the Plaintiff with the Defendant BOARD and approved by said Defendant BOARD on or about February 1, 1980; and

IT IS FURTHER ORDERED and adjudged that the Plaintiff shall secure a permit from the Defendant BOARD, in accordance with regular procedure, and pay all necessary fees required by Defendant BOARD, relative to the construction of the drive approach to the above described property and the passing lane in accordance with estab-

lished practice and post a restoration bond in the sum of FIVE THOUSAND DOLLARS ($5,000.00) to assure the cleanup of the work performed under the said Permit; and

IT IS FURTHER ORDERED that the Plaintiff shall assume and pay the entire cost of the driveway approach into the aforesaid property and of the passing lane on the south side of West Road opposite the above described property, referred to hereinafter as the "PROJECT"; and [*The passing lane portion of the PROJECT shall be completed not later than June 1, 1982. The Plaintiff shall deposit with the defendant an irrevocable bank letter of credit payable to defendant in the amount of $20,000.00 to guarantee completion of the passing lane and . . .*]

IT IS FURTHER ORDERED that the Plaintiff shall retain a reputable contractor to perform the work and construction described as the PROJECT, said contractor being acceptable to the Defendant, BOARD; and enter into a contract to begin work on the PROJECT as soon as weather permits and completed within 45 days after starting work on the project.

No costs assessed, a public question being involved.

/s/ THOMAS J. BRENNAN
CIRCUIT JUDGE

(*Certification Omitted*)

RESPONDENTS' APPENDIX C

PLAINTIFF'S POST HEARING BRIEF

(State of Michigan — Circuit Court — County of Wayne)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff, vs. WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, AND HAROLD H. BONDY, individually, jointly and severally, Defendants — C.A. No. 83 334 841 CZ; HONORABLE PAUL S. TERNAS)

STATEMENT OF THE CASE

Plaintiff is seeking relief by Writ of Mandamus or Injunctive Relief to compel the Wayne County Road Commission to issue permits to allow LOYER EDUCATIONAL TRUST to tap into certain utilities in the Sibley Road right of way and to allow plaintiff to open its strip shopping center on Sibley Road without the interference of the County in blocking or barricading the driveway, which will service its commercial development.

STATEMENT OF FACTS

Plaintiff, LOYER EDUCATIONAL TRUST, applied for permits from Brownstown Township to construct a strip shopping center on Sibley Road, between Telegraph Road and I-75. Sibley Road right of way is owned and maintained by the Wayne County Road Commission. The commercial development by the Trust was begun and construction commenced. The construction proceeded according to architect's drawings and plans which had previously been submitted to all of the Planning Com-

missions and different governmental agencies for approval and which had been approved. After applying for a permit to the Wayne County Road Commission for construction of a driveway which would access Sibley Road a two lane highway having a speed limit of 45 miles per hour, the plaintiff was denied a permit to connect to utilities under the Sibley Road Right of Way and to construct its driveway. The Wayne County Road Commission refused plaintiff's request for a permit for one major reason: Plaintiff did not agree to provide any improvements in the Sibley Road right of way and in more particular install a passing lane on the opposite side of the Sibley Road right of way from the commercial development. Plaintiff attempted on numerous occasions to meet with the Wayne County Road Commission to submit viable alternative plans to construct a safe driveway, however, the Road Commission consistently refused to allow the permit and therefore, the tapping of the utilities and opening of the Shopping Center due to the passing lane requirement. The construction of a passing lane and re-routing or enclosure of a county drain made this requirement impossible to comply with in light of the total cost of the shopping center. Plaintiff is without legal remedy in this case unless the Court takes action. Why this Court must order Injunctive Relief or Writ of Mandamus to assist the LOYER EDUCATIONAL TRUST is based on facts as presented at a hearing which included the following: That there would have to be an inordinate amount of time to rebuild the structure which was almost completed in the event it burned. There would have to be new leases drawn and the possibility of loss of these leases exists because of time passing. There is no way to measure actual money damages, even though many money damages have been sustained to this point. The future money damages will be hard to calculate. There was testimony that there is

constant vandalism and necessity for fire protection at the building. There was testimony that *competition* by way of other developments moving into the area makes time of the essence in order to allow the Loyer Educational Trust to compete fairly with the other developments in the area. There was testimony that the negative impact by way of an image of a[n] uncompleted project detracts from the appearance of the area and the general psychological impact of trying to provide an exceptionally high quality shopping center in the area. There was testimony that leases already have been broken. Testimony by L. Loyer indicated that construction on the building should be completed while the water and the soil is still frozen to mitigate a cost factor in tapping into the utilities, apparently digging deeply into the soil to tap into these utilities would be easier in the winter time when the soil was frozen and the water was not present to cause hardship. There have been many maintenance problems including the frozen roof drains and broken roof drains for the last 2 winters because of no heat in the building. The cost to the Trust is prohibitive and testimony, though not agreed upon, set the cost for the right of way improvements at $150,000.00 when the cost of the entire project is $500,000.00 to $550,000.00. The Loyer Educational Trust is, therefore, at the mercy of this Court's injunctive relief in order to get the facility opened and leased out to mitigate it's actual money damages, in view of the factors considered here as showing that the legal remedy is inadequate. Time is of the essence here and it is impossible to calculate the harm caused by delay in terms of actual money damages where a competitor opens before the Trust.

ISSUE:

DOES THE WAYNE COUNTY ROAD COMMISSION HAVE THE AUTHORITY TO COMPEL THE INSTALLATION OF ANY RIGHT OF WAY IMPROVEMENTS, AND IN PARTICULAR A PASSING LANE ON THE OPPOSITE SIDE OF THE HIGHWAY FROM THE COMMERCIAL DEVELOPMENT BY THE COMMERCIAL DEVELOPER, LOYER EDUCATIONAL TRUST?

Answer: Absolutely not.

The Michigan Supreme Court dealt with a similar issue to the instant case in *Arrowhead Development Company* v *Livingston County Road Commission*, 413 Michigan 505, 322 Northwestern Reporter 2nd series 702. In *Arrowhead*, a subdivision developer brought an action to vacate a portion of a subdivision plat and sought to prevent the County Road Commission from enforcing an agreement between the parties that would require the developer to regrade portions of road outside of the development in order to make required intersection with the County Road safer for automobile traffic. The Michigan Supreme Court held in favor of the developer in *Arrowhead Development Company*, the Court held:

> "While under § 183(1)(b) the commission could have required that Arrowhead layout Navajo Trail in a way which would locate it's intersection with Chilson Road at a safe distance from the hazardous site obstruction, it was not free, under color of § 183, to require repairs to be made on Chilson Road at the expense of the subdivider as a condition of approval of a plat in which the Navajo Trail — Chilson Intersection was laid out in the manner posing a traffic hazard. That is par-

ticularly so since the plat as submitted called for a cul-de-sac terminating Navajo Trail at Chilson Road, but the commission required Arrowhead to eleminate the cul-de-sac and open Navaho Trail, creating the concededly dangerous intersection.

"Although § 183 does not itself contain an explicit restriction on the Commission's authority to require offsite road improvements, the fact that it does not contain an explicit or fairly compiled grant of such authority suggests that none was intended by the legislature, especially since §§ 105 and 106 specifically delineate the requirements the commission may make of subdividers. We conclude that § 183 does not authorize the action of the Commission in this case.

"We are fortified in the conclusion that § 183 does not empower the commission to impose upon the appellant the duty to sustain the costs of the offsite road improvements in this case by the fact that nowhere does there exist any statutory provision to finding suitable standards governing cost allocation of offsite improvements. Apart from the constitutionality of the proposed exaction in this case, a question we neither reach nor decide, it is clear that it would be impermissable to impose the entire costs of an offsite improvement on a single subdivision developer where other persons or property would be specifically benefited. The absence of a statutory provision establishing standards and procedures for such apportionment is indicative of a legislative assumption that the responsibilities of the subdivision developer do not extend beyond the borders

> of the subdivision itself unless explicity imposed by the legislature." *Arrowhead Development Company* v *Livingston County Road Commission*, NW2d 709 (1982).

In the Arrowhead Case the position of the Livingston County Road Commission was set forth on page 708 of the opinion:

> "The Commission realized primarily upon the emphasized subsection (1)(b) of § 183 as justifying it's demand that Arrowhead sustain the costs of repairs to Chilson Road. In it's brief, the Commission declares that, '(t)he Statute (Section 183(1)(b) expressly authorizes the County Road Commission to condition approval of a plat upon certain exactions to insure the safety of those entering existing county roads from a proposed subdivision street'. Footnote *10 Appellee's Brief page 9* While we think the Appellant claims more for the language of subsection (1)(b) than is there to be found, Footnote *11 'Subsection b authorizes the County Road Commission to require adequate provision for traffic safety in laying out drives which enter County Roads'. (Emphasis added.) Arguably that is something less than 'insuring the safety of those entering the existing county roads.'* There is still other reason to conclude that in defining the powers of a Road Commission who impose requirements upon developers as conditions for approval of proposed plats, the legislature did not intend to permit the action demanded in this case."

In *Arrowhead* the State Supreme Court in reading the Act setting forth the statutory authority of the Road Commission came to the conclusion that the Road Com-

mission could not compel a subdivision developer as a condition precedent to approval of the plat to make substantial improvements in the County Road System and in Footnote 11, the opinion argues that "adequate provision for traffic safety in laying out drives which enter County Roads" is something less than insuring safety of those entering the existing county roads.

In the Loyer case, we are dealing with a driveway situation and not a subdivision development. The County has forbidden approval of a permit to open the facility and begin to conduct business based on the driveway statute. The legislature enacted Act 200, 1969 Pg 382, Driveways, Banners and Parades, an act to regulate driveways, banners and parades upon and over highways. MSA 9.140(21) Definitions sets forth the definition of a driveway. "(a) Driveway means a driveway, lane, road or other way providing vehicular access to or from the highway from or to property adjoining the highway, but does not mean a city or village street or other highway covered by the provision of Act 288 of Public Acts being Sections 560.101 to 560.293 of the Compiled Laws of 1948. (b) highway means a state trunkline highway or a county road including the entire right of way (c) highway authority means Department of State Highways in the case of state trunkline highways and the Board of County Road Commissioners in the case of county roads." The Act goes on to indicate that permits for driveways shall be granted in conformity with rules promulgated by the Highway Authority in Section 9.140(24) as follows:

> "Rules shall prescribe reasonable standards for the design and location of driveways and may require that driveways shall be hard surfaced. The provisions of this section shall not be deemed to

> deny reasonable access to a nonlimited access highway."

Additionally, § 9.140(25) indicates as follows:

> "The boards of county road commissioners may adopt by reference the rules, in whole or in part, of the Department of State Highway or may adopt its own rules after a public hearing of which Notice has been given by publication at least twice in a newspaper circulated in the county not more than thirty days nor less than seven days prior to the hearing."

The Wayne County Road Commissioners did promulgate certain rules which have been updated and which were attached to the Road Commission's Prehearing Brief called Rules Standards and Procedures for Driveways Within Wayne County Road Commission Right of Way. Within these rules includes the provision that the developer of certain parcels must include a passing lane in the right of way as part of its application for obtaining a permit to open its driveway to the public highway. It is this type of unreasonable requirement that is set forth in the Rules and Standards which the Michigan Supreme Court addressed itself to in *Arrowhead Development Company* v *Livingston County*. The Michigan Supreme Court on Page 709 said:

> "These are not costs historically imposable upon the subdivision developer. They are met by taxation and special assessments to benefit individuals and properties. Similarly, the regrading of a county road adjacent to a new subdivision development, in order to safely accomodate traffic generated by the new community, is a public obligation. A legislative intention to impose such a burden upon a nearby private developer would

> be a notable departure from the historic manner of funding alterations to public property, and we think it would have made such an intention explicit.
>
> We hold that the Commission exceeded its limited statutory powers in conditioning the plat approval upon Arrowhead's agreement to pay for the off-site county road improvement. Consequently, the judgment of the Court of Appeals is reversed."

It is clear from this holding by the Michigan Supreme Court that the statutory authority of the County Road Commission does not extend to forcing developer to pay for off-site road improvements which are clearly within the jurisdiction and duty as statutorily imposed on the County Road Commission.

Since the decision in *Arrowhead Development Company* the Michigan Court of Appeals has further defined this situation in the case of *Charter Township of Harrison* v *Calisi*, 121 Mich App 777, In Calisi, the defendants, the Calisi's, wanted to open a restaurant and nightclub facility on Jefferson Avenue in Harrison Township, Macomb County, and applied to the Township for approval of a planned expansion and improvement of their establishment. Several meetings were held by the Township Planning Commission in reviewing the site plan submitted by defendants and the Commission conditioned its approval on a requirement that the defendants construct a deceleration or a bypass lane at the entrance of their establishment so that cars waiting to turn into the restaurant parking lot would not stall through traffic. This bypass lane was not constructed. In July of 1980, the plaintiff, township, brought suit in the Macomb County Circuit Court to compel defendants to

construct the bypass lane. Plaintiff claims that the bypass lane was ordered by the Planning Commission in accordance with the Zoning Ordinance, that defendants through their attorney agreed to install the bypass in that defendants have failed to comply with the condition for issuance of the building permit and with their promise. The defendants responded to the Complaint by denying that the plaintiff had legal authority to impose a site review requirement and further denied that the Township had authority to require off site improvements as a condition for granting a building permit. The Court on Page 784 defined the issue of the case:

> "The issue that ultimately must be decided in this case is whether the condition imposed by the Township was a valid exercise of its discretion. In other words, was plaintiff permitted to require, as a condition of approving a building permit, that defendants build an off-site improvement — a bypass lane within the street right of way?"

The Court held on Page 785:

> "Analyzing both the County Road Law, MCL 224.1 et seq. MSA 9.101 et seq. and the Michigan Subdivision Control Act of 1967, MCL 560.101 et seq. MSA 26.430 (101) et seq. the Court found that neither Act authorized the Road Commission to impose the duty of payment for off-site road improvements, besides finding no explicit authority within the statutes to impose such an obligation, the Court further held that considering the Acts as a whole in the light of history and common sense no such extraordinary powers should be implied. Analysing the Township Rules Zoning Act and the Township Planning Act and their obvious relationship to the Acts considered

> in *Arrowhead Development Company* v *Livingston County Road Commission*, we find no explicit grant to the Townships nor to their Zoning or Planning commissions to condition building permits on off site improvements. Neither do we see, considering the acts as a whole in light of such history and common sense, that such authority should be implied."

The Court went on to say:

> "By finding that the plaintiff was without authority to impose the requirements that it attempted, we necessarily must find that its theories for enforcing such requirements must fail." *Calisi*, PP 787 and 788.

The Court of Appeals also set forth a quotation from the *Arrowhead Development Company* case which they relied upon:

> "The Commission relies heavily on the argument that the need to level the obstructing hill on Chilson Road is caused by the existence of the subdivision as such as a problem solely attributable to *Arrowhead*, consequently it is argued that *Arrowhead* must pay the elimination. The same argument can be made however to justify the cost of police and fire protection, traffic signals, public school facilities, public lighting, road widening and all other public services made necessary by the existence of a new residential community. These are not costs historically imposed upon the subdivision developer. They are met by taxation and special assessments to benefit individuals and properties. Similarly, the regrading of the county road adjacent to a new subdivision development, in order to safely accommodate

> traffic generated by the new community, is a public obligation. A legislative intention to impose such a burden upon a nearby private developer would be a notable departure from the historic manner of funding alterations to public property and we think it would have made such an intention explicit." *Calisi* P 786

The position of LOYER EDUCATIONAL TRUST is not dissimilar to those as set forth in *Arrowhead* and *Calisi.* Loyer is basing its case on the fact that no authority exists for the Road Commission to compel the off-site road improvements notwithstanding that the section the Road Commission is relying on is the authority to promulgate rules under the Driveway Act. The Supreme Court already addressed that Driveway Act in the *Arrowhead* case in the footnote and gave it little importance in light of the historic implications in reading the Act in its entirety. For this reason, this Court must follow the *Arrowhead* and *Calisi* cases and order the County Road Commission to issue permits to Loyer to open his driveway and tap into the utilities.

An issue was never raised suggesting that Loyer would not comply fully with all reasonable requirements as set forth by the County Engineers in tapping utilities making connections of the driveway to the right of way. Therefore, on the issue of law, the County is in violation of the law and as such this Court is empowered to compel them to stop interferring with Loyer's operation and development and to issue a building permit in the usual and proper manner.

Arrowhead sets out a clearly delineated path:

> "While there is no dispute that the Legislature has imposed this duty on counties, we are unable to find any basis to conclude that the statute

> either explicitly or implicitly authorizes the commission to discharge that duty by imposing the costs of county road improvements upon the developers of nearby subdivisions. To the contrary, the provision of the county road law which imposes this affirmative duty upon the road commission, M.C.L. § 224.1 et seq.; M.S.A. § 9.101 et seq., specifically provides that the permissible methods of financing county road improvement are borrowing and taxation. Nowhere in the statute is there to be found authorization for exacting the cost of a county road improvement from a subdivision developer, and we think none can be fairly implied." *Arrowhead* p 706

The Supreme Court's ruling could not be clearer. It follows that this court's course of action based on the facts and law should be equally clear: Order the Road Commission to stop interfering with the Trust's permit and opening of the shopping center.

Respectfully submitted,

M. Gary Holland P23197
Attorney for Plaintiff
23394 Goddard Road
Taylor, Michigan 48180

Dated: May __, 1986.

RESPONDENTS' APPENDIX D

EXCERPTED TRIAL TRANSCRIPT

(State of Michigan — Circuit Court — County of Wayne)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff, -vs- WAYNE COUNTY ROAD COMMISSION, and BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES and HAROLD H. BONDY, Individually and Severally, Defendants — Case No. 83-334841-CZ)

PROCEEDINGS HAD in the above-entitled cause, before the HONORABLE RICHARD D. DUNN, Judge, Third Judicial Circuit, at Courtroom 1401 City-County Building, Detroit, Wayne County, Michigan, on Wednesday, May 13, 1986.

APPEARANCES: M. GARY HOLLAND, Esq.,
On behalf of the Plaintiff.
LAMBRO NIFOROS, Esq.,
On behalf of the Defendant.

* * *

(4) * * * THE COURT: Do you want to make an opening statement?

MS. NIFOROS: We would keep it brief, perhaps.

MR. HOLLAND: Okay.

THE COURT: All right.

MR. HOLLAND: Your Honor, Plaintiff's position in this case is that the Loyer Educational Trust is developing a shopping concern, a strip-shopping center on Sibley, between Telegraph and I-75,

THE COURT: Who is Loyer Educational Trust?

MR. HOLLAND: Your Honor, that was an educational trust that was setup by Mr. Loyer for his children. And over the course the last 20 years or so, certain amounts of money have been deposited in that trust.

His children are now grown, and they expended (5) monies on their education. And now they have completed their educations and there were certain sums left in the trust that were then invested for them in building this shopping center. And that is how the trust become the Plaintiff in this case.

THE COURT: All right.

MR. HOLLAND: The trust applied to Brownstown Township for a permit to develop the shopping concern and got certain proofs from the DNR and the township.

They began construction and they built a shell of a building. And at that time they requested a permit to open their driveway at the shopping center site, also to tap into the water line which was on the opposite side of Sibley. They were denied a permit unless they met certain requirements.

And among these requirements by the Wayne County Road Commission were that they either enclose or move the Van Cliff drain which was on the north side of Sibley. That they pave an intersection for a private road at which is called Emit, E-M-I-T. That Loyer Construction Company moved there driveway to line up with Emit. And the Loyer driveway is on the south side of Sibley Road. And additionally the fourth requirement was to put a passing lane on the north side of Sibley from the shopping center development.

The trust had expended certain amounts of money to (6) build this project. And at the time the requirements were made by the Wayne County Road Commission, they objected to them saying these were unreasonable requirements and that they weren't, the Road Commis-

sion had no authority to compel them to muck out this ditch or move it and to put this passing lane in the right-of-way.

Several different driveway designs were negotiated with the Road Commission to try to lessen any traffic hazard. None of these negotiations amounted to a settlement of the case.

Loyer Educational Trust then filed a lawsuit requesting injunctive relief, which was denied. And the case has now come to trial because the project has been setting vacant for these three or four years, because they could not open up because the road commission had threatened to barricade their driveway had they opened up without putting a passing lane on the right-of-way.

It is the Plaintiff's position that they are not required to put in right-of-way improvements such as a passing lane.

It is also the Plaintiff's position that the Road Commission was making a requirement to move the Van Cliff drain, which that is under the jurisdiction of the Drain Commission. And they made that a part of their permit.

And that was — some of this was admitted in (7) testimony that was taken prior to today before Judge Teranes in the injunctive hearing. I would like to, just briefly, my case will be the presenting of Mr. Loyer, the contractor who was the father of the children in the Loyer Educational Trust who was hired to do the work.

He was the contractor hired by the trust to put up the building and do the work. Also, I will have a real estate person here as my second witness to testify as to the amount of damages that the Loyer Trust lost as a result of this building not being opened, as a result of no permit being issued.

Your Honor, originally there was an issue in this case of Loyer not being able to tap into the water because the water was on the opposite side of Sibley.

Since the change in the administration at the Wayne County Road Commission that issue has been resolved in that even though it was part of our complaint originally, the Wayne County Road Commission under the new administration allowed Mr. Loyer to tunnel or bore underneath Sibley Road and tap into the water so he has fire protection at the building. However this did happen approximately two, two and a half years after the problems began.

THE COURT: Are there fire hydrants there?

(8) MR. HOLLAND: Yes, Your Honor.

And we are requesting that this Court make a finding that the Wayne County Road Commission had no authority to require the Loyer Educational Trust to put these improvements in the right-of-way specifically the passing lane.

Secondly, we are requesting damages in an amount to be testified to by the real estate man for the fact they have lost use of this building for the 3-4 years it has been vacant.

Thank you, your Honor.

* * *

RESPONDENTS' APPENDIX E

EXCERPT FROM PETITIONER'S BRIEF ON APPEAL TO THE MICHIGAN COURT OF APPEALS

(State of Michigan — Circuit Court — County of Wayne)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff/Appellant, vs. WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants/Appellees — Court of Appeals No. 93959; APPEAL FROM WAYNE COUNTY CIRCUIT COURT, No. 83334841CZ)

* * *

TABLE OF CONTENTS

[*Original*]
PAGE NO.

Table of Cases ii

Table of Statutes ii

Table of Articles and Amendments of the United States and Michigan Constitutions ii

Issues:

I THE WAYNE COUNTY ROAD COMMISSION MAY NOT, AS A PRECONDITION TO GRANTING A DRIVEWAY PERMIT, COMPEL A PRIVATE DEVELOPER TO INSTALL OFF-SITE ROAD IMPROVEMENTS TO A COUNTY OWNED AND MAINTAINED ROAD. 4

[*Original*]
PAGE NO.

II THE ACTION BY THE WAYNE COUNTY ROAD COMMISSION IN DENYING THE PERMIT FOR LOYER EDUCATIONAL TRUST CONSTITUTED A TAKING OF PRIVATE PROPERTY FOR PUBLIC AND/OR PRIVATE PURPOSES WITHOUT ADEQUATE COMPENSATION. 13

III THE ACTION BY THE WAYNE COUNTY ROAD COMMISSION CONSTITUTED DISCRIMINATION AND A DENIAL OF EQUAL PROTECTION TO LOYER EDUCATIONAL TRUST. 15

Statement of Facts 1

Argument:

Issue I 4-12
Issue II 13-14
Issue III 15-16

Conclusion 17-18

Relief 19

TABLE OF CASES

Arrowhead Development Co. v *Livingston County Road Comm'n.*, 413 Mich 505, 322 NW2d, 702 (1982) 4, 5, 6, 8, 9, 10, 11, 17, 18

Charter Township of Harrison v *Calisi*, 121 Mich App 777, 329 NW2d 488 (1982) 10, 11, 17

Soper v *Ridgemoor Country Club*, 275 Mich 129 266 NW 415 (1936) 13

[*Original*]
PAGE NO.

TABLE OF STATUTES

General Highway Law, Act 283, 1909 as amended. Mich. Comp. Laws. Ann. § 224.21; Mich. Stat. Ann. § 9.121 ..... 5, 8, 11, 17

Driveways, Banners and Parades, Act 200, 1969, p. 382, imd. eff. Aug. 6; Mich. Comp. Laws. Ann § 247.234; Mich. Stat. Ann. § 9.140(24) .. 7, 11, 17, 18

Subdivision Control Act, Act 288, 1967, p. 589, eff. Jan. 1, 1968; Mich. Comp. Laws Ann. § 560.183; Mich. Stat. Ann. § 26.430(183) 5, 8, 9, 11, 17, 18

Township Rural Zoning Act, Act 184, 1943, p. 264; eff July 30; Mich. Comp. Laws Ann. § 125.286, et. seq.; Mich. Stat. Ann. § 5.2963, et. seq. . 10, 11, 17, 18

TABLE OF ARTICLES AND AMENDMENTS OF UNITED STATES AND MICHIGAN CONSTITUTIONS

Amendment V of the United States Constitution 13, 16

Amendment XIV of the United States Constitution .. 16

Article X, Section 2, Michigan Constitution 13

* * *

ISSUE II

THE ACTION BY THE WAYNE COUNTY ROAD COMMISSION IN DENYING THE PERMIT FOR LOYER CONSTITUTED A TAKING OF PRIVATE PROPERTY FOR PUBLIC AND/OR PRIVATE PURPOSES WITHOUT ADEQUATE COMPENSATION.

The Michigan Constitution Article X, Section 2:

> "Eminent Domain; Compensation. Section 2 — Private Property shall not be taken for public use

> without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a Court of Record."

It is clear by the Michigan Constitution, Article X, Section 2, Title I, Fundamental Law, that private property can only be taken for public purpose by paying adequate compensation therefor and the clear implication in this Section of the Constitution and the holdings in cases in the State of Michigan indicate that private property may not be taken at all for private purposes. This principle was clearly stated in the case of *Soper* v *Ridgemoor Country Club*, 275 Mich 129, 266 NW 415 (1936).

The principles of constitutionality are also set forth in the Constitution of the United States. Amendment V of the Constitution of the United States which states:

> "Rights of persons charged with crimes; guarantee of life, liberty and property. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces or in the malitia, when in actual service in time of a war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution Amendment V.

The testimony at the trial in this matter was clear. The taking of LOYER's property was the act of denying him a permit unless he complied with the demand by the Wayne County Road Commission to put in improvements that they were not authorized to request of him. Since the Wayne County Road Commission had authority to grant or deny permits, they used their color of authority to deny the opportunity for LOYER to open the Sibley Plaza. This constituted the taking of the LOYER property. Additionally, the testimony is replete with references that allowed a competitor located just down the street from LOYER to open his business while not imposing the same requirements on that competitor. (See portion of Transcript Attachment B)

The damages requested by Loyer Educational Trust at the Trial were uncontested. LOYER suffered loss of rents which were established by expert testimony and not rebutted. Additionally, Loyer presented uncontroverted testimony of the discriminatory practices of the Wayne County Road Commission in granting a driveway permit and sharing the cost of improvements with a competitor of LOYER in the same vicinity as the Sibley Shopping Plaza. LOYER asks that this Court summarily dispose of the issue of damages by awarding its request of damages in the amount of $872,000.00 plus costs, interest and attorney fees so wrongfully sustained.

ISSUE III

THE ACTION BY THE WAYNE COUNTY ROAD COMMISSION CONSTITUTED DISCRIMINATION AND A DENIAL OF EQUAL PROTECTION TO LOYER EDUCATIONAL TRUST.

It is clear that the Wayne County Road Commission can require a developer to do certain things to put in his

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toward LOYER. This type of application of a non-standard is violative both of the *County Road Law* and the *Michigan Constitution* and the *United States Constitution,* Amendent V and XIV, in violation of the "due process clause" and "equal protection clause".

* * *

RESPONDENTS' APPENDIX F

EXCERPT FROM PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT

(State of Michigan — Supreme Court)

(LOYER EDUCATIONAL TRUST, LARRY McDONALD, TRUSTEE, Plaintiff/Appellant, vs. WAYNE COUNTY ROAD COMMISSION, BROWNSTOWN TOWNSHIP, AND THE BOARD OF WAYNE COUNTY ROAD COMMISSIONERS, GRACE R. HAMPTON, CLAUDE DUKES, and HAROLD H. BONDY, individually, jointly and severally, now County of Wayne, its successor in interest, Defendants/Appellees — Supreme Court No. ____; Court of Appeals No. 93959; Wayne County Circuit Court No. 83334841CZ)

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TABLE OF CONTENTS

[*Original*]
PAGE NO.

Table of Cases ii

Table of Statutes ii

Table of Articles and Amendments of the United States and Michigan Constitutions ii

Issues:

I THE WAYNE COUNTY ROAD COMMISSION MAY NOT, AS A PRECONDITION TO GRANTING A DRIVEWAY PERMIT, COMPEL A PRIVATE DEVELOPER TO INSTALL OFF-SITE ROAD IMPROVEMENTS TO A COUNTY OWNED AND MAINTAINED ROAD. 5

[*Original*]
PAGE NO.

II THE ACTION BY THE WAYNE COUNTY ROAD COMMISSION IN DENYING THE PERMIT FOR LOYER EDUCATIONAL TRUST CONSTITUTED A TAKING OF PRIVATE PROPERTY FOR PUBLIC AND/OR PRIVATE PURPOSES WITHOUT ADEQUATE COMPENSATION. 14

III THE ACTION BY THE WAYNE COUNTY ROAD COMMISSION CONSTITUTED DISCRIMINATION AND A DENIAL OF EQUAL PROTECTION TO LOYER EDUCATIONAL TRUST. 17

IV THE COURT OF APPEALS CLEARLY ERRED IN A FACTUAL MISSTATEMENT. .....

Application for Leave to Appeal 1

Statement of Facts 1

Argument:

Issue I A 5-10
B 11-12
C 12
Issue II 14-17
Issue III 17-18
Issue IV 19-20

Conclusion 21-23

Relief 24

TABLE OF CASES

Arrowhead Development Co. v *Livingston County Road Comm'n.*, 413 Mich 505. 322 NW2d, 702 (1982) 4, 5, 8, 9, 10, 11, 12, 13, 21, 22, 23

[*Original*]
PAGE NO.

Charter Township of Harrison v *Calisi*, 121 Mich App 777, 329 NW2d 488 (1982) 4, 22, 21, 22, 23

Soper v *Ridgemoor Country Club*, 275 Mich 129 266 NW 415 (1936) 14

First English Evangelical Lutheran Church of Glendale v *County of Los Angeles, California*, 96 LE2d 250, 107 S. Ct. 2378 (1978) 15

Nollan v *California Coastal Commission*, 107 S. Ct. 3141 (1987) 15

Poirer v *Grand Blanc Township, et. al*, Lawyers Weekly No. MA-5779 15

TABLE OF STATUTES

General Highway Law, Act 283, 1909 as amended. Mich. Comp. Laws. Ann. § 224.21; Mich. Stat. Ann. § 9.121 ..... 5, 8, 11, 17

Driveways, Banners and Parades, Act 200, 1969, p. 382, imd. eff. Aug. 6; Mich. Comp. Laws Ann. § 247.234; Mich. Stat. Ann. § 9.140(24) ... 3, 4, 8, 10, 17, 21, 22

Subdivision Control Act, Act 288, 1967, p. 589, eff. Jan. 1, 1968; Mich. Comp. Laws Ann. § 560.183; Mich. Stat. Ann. § 26.430(183) 4, 5, 9, 10, 22

Township Rural Zoning Act, Act 184, 1943, p. 264; eff July 30; Mich. Comp. Laws Ann. § 125.286, et. seq.; Mich. Stat. Ann. § 5.2963, et. seq. 4, 5, 11, 12, 22

[*Original*]
PAGE NO.

TABLE OF ARTICLES AND AMENDMENTS OF UNITED STATES AND MICHIGAN CONSTITUTIONS

Amendment V of the United States Constitution . 18

Amendment XIV of the United States Constitution .. 18

Article X, Section 2, Michigan Constitution 18

* * *

ISSUE II

THE ACTION BY THE WAYNE COUNTY ROAD COMMISSION IN DENYING THE PERMIT FOR LOYER CONSTITUTED A TAKING OF PRIVATE PROPERTY FOR PUBLIC AND/OR PRIVATE PURPOSES WITHOUT ADEQUATE COMPENSATION.

The Michigan Constitution Article X, Section 2:

> "Eminent Domain; Compensation. Section 2 — Private Property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a Court of Record."

It is clear by the Michigan Constitution, Article X, Section 2, Title I, Fundamental Law, that private property can only be taken for public purpose by paying adequate compensation therefor and the clear implication in this Section of the Constitution and the holdings in cases in the State of Michigan indicate that private property may not be taken at all for private purposes. This principle was clearly stated in the case of *Soper* v *Ridgemoor Country Club*, 275 Mich 129, 266 NW 415 (1936).

The principles of constitutionality are also set forth in the Constitution of the United States. Amendment V of the Constitution of the United States which states:

> "Rights of persons charged with crimes; guarantee of life, liberty and property. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces or in the malitia, when in actual service in time of a war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution Amendment V.

The testimony at the trial in this matter was clear. The taking of LOYER's property was the act of denying it a permit unless he complied with the demand by the Wayne County Road Commission to put in improvements that the County was not authorized to request of him. Since the Wayne County Road Commission had authority to grant or deny permits, they used their color of authority to deny the opportunity for LOYER to open the Sibley Plaza. This constituted the taking of the LOYER property. Additionally, the testimony is replete with references that allowed a competitor located just down the street from LOYER to open his business while not imposing the same requirements on that competitor. (See portion of Transcript Attachment B)

The damages requested by Loyer Educational Trust at the Trial were uncontested. LOYER suffered loss of rents

which were established by expert testimony and not rebutted. Additionally, Loyer presented uncontroverted testimony of the discriminatory practices of the Wayne County Road Commission in granting a driveway permit and sharing the cost of improvements with a competitor of LOYER in the same vicinity as the Sibley Shopping Plaza, without any standard for payment having been established.

Recently the United States Supreme Court handed down its decision in a series of cases wherein regulation by a governmental agency constituted a taking for which compensation is required.

These cases are: *First English Evangelical Lutheran Church of Glendale* v *County of Los Angeles, California*, 96 LE2d 250, 107 S. Ct. 2378 (1987) and *Nollan*, v *California Coastal Commission*, 107 S. Ct. 3141 (1987), and they bolster the argument already set forth in Plaintiff/Appellant's Brief regarding the taking of Plaintiff/Appellant's property and the necessity of compensating Plaintiff/Appellant for that taking even though it may only be a temporary taking.

The Michigan Court of Appeals applied the law in the case of *Poirer* v *Grand Blanc Township, et al*, Lawyers Weekly No. MA-5779 and determined there was a temporary taking requiring compensation.

It must be pointed out that these cases dealt primarily with zoning issues, however the Constitutions of Michigan and The United States apply to all laws, not just zoning issues where there has been a taking without adequate compensation.

Once the Trial Court and Court of Appeals found that the action by Wayne County Road Commission was proper, they summarily dismissed *Loyer's* argument that

the action constituted a taking without adequate compensation.

The Court of Appeals also summarily dismissed the "Due Process" argument and "Equal Protection" argument "finding no disparite treatment."

The fact of the matter remains that *Loyer* has been unable to open its Shopping Center and damages continue.

ISSUE III

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